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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 324

HOME FURNITURE COMPANY, GEORGE H. PARK, AND JAMES F. KILCREASE, ETC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE SOUTHERN PACIFIC COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

FILED MARCH 21, 1925

(30,970)

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 18, 1925

[fol. a] [Caption omitted]

[fol. 1] **IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS, EL PASO DIVISION**

No. 146. In Equity

HOME FURNITURE COMPANY, a Copartnership, and GEORGE H. PARK and JAMES F. KILCREASE, Individually and as Partners in Trade, Composing the Partnership of and Doing Business under the Firm Name and Style of Home Furniture Company, Plaintiffs,

versus

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, The Southern Pacific Company, a Corporation, and El Paso & Southwestern Railroad Company, a Corporation, Defendants.

BILL OF COMPLAINT—Filed Oct. 23, 1924

To the Honorable Judge of the District Court of the United States for the Western District of Texas, El Paso Division:

The Home Furniture Company, a co-partnership, and George H. Park and James F. Kilcrease, individually, and as partners in trade composing the partnership of and doing business under the firm name and style of Home Furniture Company, Plaintiffs above named, bring and file this their Petition and Bill of Complaint, acting by and through their attorneys and solicitors, Jos. U. Sweeney and Edward C. Wade, Jr., against the above named defendants, The United States of America, the Interstate Commerce Commission, The Southern Pacific Company, a corporation, and El Paso & Southwestern Railroad Company, a corporation, and complain and allege:

I

That the above named plaintiffs, George H. Park and James F. Kilcrease, are resident-citizens and tax payers of the City of El Paso, County of El Paso, and State of Texas, and reside within the Western [fol. 2] District of Texas, El Paso Division, and compose the partnership of Home Furniture Company, and they bring this suit individually and as partners in trade composing the partnership of and doing business under the firm name and style of Home Furniture Company, all hereinafter styled plaintiffs; that plaintiffs are and have been for several years last past engaged in the furniture business with their principal place of business at El Paso, Texas, and in connection with and as part of said business buy and sell new and second-hand furniture in different parts of the United States, including New Mexico and Arizona; that plaintiffs in connection with said business for several years last past have been and are now purchasing

furniture from business houses in Chicago, Illinois, and other cities in the eastern portion of the United States, and have caused said furniture to be shipped from said cities over the lines of the Chicago, Rock Island and Pacific Railroad and the lines of the El Paso & Southwestern Railroad to El Paso, Texas, for delivery to plaintiffs; that plaintiffs for several years last past have sold large quantities of furniture, both new and second-hand, and have shipped the same to customers in New Mexico, Arizona and West Texas, and in doing so have used the lines of the Southern Pacific and the El Paso & Southwestern Railway system; that plaintiffs are now engaged in the business of shipping furniture to Arizona, New Mexico and West Texas, and in using the lines of said railway systems for that purpose, and are engaged in shipping goods, wares and merchandise in interstate commerce.

II

That defendant, The Southern Pacific Company, is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and is authorized to and does operate railroads in the States of Oregon, California, Nevada, Utah, Arizona and New Mexico, and a line of steamships between the cities of Galveston, Texas, and New Orleans, Louisiana, and the City of New York, and is authorized to operate railroads in any other State of the United States, and is a carrier by railroad engaged in the transportation of passengers and [fol. 3] property subject to the Interstate Commerce Act.

III

That defendant El Paso & Southwestern Railroad Company is a corporation incorporated under the laws of the State of Arizona and is authorized to and does operate railroads in the State of Arizona, New Mexico and Texas; that said defendant is engaged in the transportation of passengers and property in interstate commerce subject to the Interstate Commerce Act; that defendant is part of what is known as the El Paso & Southwestern Railway System consisting of the following railroad companies, viz: The El Paso & Southwestern Railroad Company, the El Paso & Southwestern Railroad of Texas, the Burro Mountain Railroad Company, the Arizona & New Mexico Railway Company, the Dawson Railway Company, the El Paso & Northeastern Railway Company, the El Paso & Rock Island Railway Company, the Alamogordo & Sacramento Mountain Railway Company, the El Paso & Northeastern Railroad Company, and the Tucson, Phoenix & Tide Water Railway Company, hereinafter, for convenience sake, referred to as the Southwestern System; that all of the issued and outstanding capital stock and a portion of the outstanding bonds of the companies comprising said System are owned directly or indirectly by the El Paso & Southwestern Company, a holding corporation of the State of New Jersey; that of the railway companies comprising said system only the defendant El Paso & Southwestern Railroad Company is engaged in the transportation of passengers and property in interstate commerce, which said company,

in addition to operating the lines of railway owned by it, operates under lease all of the existing railways of the remaining companies comprising said system.

IV

That this is a suit of a civil nature in equity which arises under the Constitution and laws of the United States wherein the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00) and is brought to enjoin, set aside, annul, and suspend an order of the Interstate Commerce [fol. 4] Commission, one of the defendants above named.

V

That on or about July 1, 1924, defendants The Southern Pacific Company and El Paso & Southwestern Railroad Company, filed and caused to be filed with defendant, The Interstate Commerce Commission, an application or petition wherein and whereby said railroad corporations asked and sought an order of the Commission approving the proposal of The Southern Pacific Company to acquire control of the Southwestern System (a) by stock ownership through the acquisition by the Southern Pacific of all of the interests of the El Paso and Southwestern Company therein, in accordance with the terms of a certain agreement entered into between the said The Southern Pacific Company and the El Paso and Southwestern Company on the 20th day of June, 1924, a copy of which is hereto attached, marked Exhibit "A" and made a part hereof, to which reference is hereby made; and (b) by lease from the defendant El Paso & Southwestern Railroad Company to The Southern Pacific Company of the lines of railway owned by it for the period of one year from and after the first day of the month following the authorization of approval by said Commission, and thereafter until terminated by either party upon thirty (30) days' notice served upon the other (the said proposed term hereof being identical with the term of the existing leases to the El Paso & Southwestern Railroad Company, whereby the said railroad company operates the major portion of the railways comprising the Southwestern System not owned by it), and by assignment from the said defendant El Paso & Southwestern Railroad Company to The Southern Pacific Company of the leases whereby El Paso & Southwestern Railroad Company now operates the existing railways of the Southwestern System not owned by it, including the assignment of any and all trackage and operating rights over foreign lines;

That in and by said application and petition said defendant railroad corporation also asked the Commission for authority to issue [fol. 5] $28,000,000 of common capital stock and $29,400,000 of five per cent. twenty-year collateral trust bonds; and that by a separate application filed on the same date the Arizona and Eastern Railroad Company requested a certificate that the present and future public convenience and necessity require the construction by it of certain

new lines of railroad in the State of Arizona in connection with the main line of the Southern Pacific Railroad Company in said State of Arizona, the location of said new lines being delineated on the map hereto attached marked Exhibit "B" and made a part hereof, to which reference is hereby made;

VI

That the first of said applications was docketed as Finance Docket No. 4164 and the second of said applications covering the proposed construction of extensions and branch lines by the Arizona and Eastern Railroad Company was docketed as Finance Docket No. 4148; that divers persons filed protests with the said Commission against the granting of the first of said applications and petitions, including the Attorney General of Texas representing the State of Texas and the Railroad Commission of Texas, and the attorneys and solicitors appearing herein for these plaintiffs; that thereafter, to-wit: on September 8, 1924, a portion of said Commission known as Division 4, consisting of three Commissioners, to-wit: Commissioners Meyer, Eastman and Potter, proceeded to hold a hearing on said application.

VII

That the proceedings before said three Commissioners mentioned and referred to in the preceding paragraph hereof, finally culminated, terminated and resulted in a report of said Division, composed of said three Commissioners, two of said Commissioners, in effect, approving both of said applications and the authorization therein prayed for, and the third Commissioner dissenting from the report of the majority and finding in substance and effect that the authorization granted by the other two Commissioners was in violation of the letter [fol. 6] and the spirit of the law, and therefore in excess of the authority of the Commission; that as a result of said report and decision an order and certificate of said Division was made, dated the 30th day of September, A. D. 1924, in effect authorizing the acquisition of control by the Southern Pacific Company of the Southwestern System and the issuance of the stock and bonds prayed for and the construction of said extensions and branch lines; all of which will appear in and by the said report and the order based thereon, a copy of which is attached hereto marked Exhibit "C", to which reference is here made and by such reference made a part hereof, as fully and as completely as if set out herein in full.

VIII

That in and by said order it was provided that said order, including the certificate of necessity therein contained, should not become effective for a period of thirty days from the date thereof, that plaintiffs are informed and believe, and upon such information and belief allege the fact to be, that said defendant railroad companies claim, assert and contend that said report, decision, order and certificate

are and constitute ample and complete authority to them for the acquisition by The Southern Pacific Company of the control and ownership of the Southwestern System, the issuance of the stocks and bonds referred to, and the construction of the extensions and branch lines, and said corporations are about to proceed to carry out the terms of said agreement of June 20, 1924 (Exhibit "A") and to consolidate the Southwestern System with The Southern Pacific Company and the Southern Pacific System, thereby consolidating such carriers into a single system for ownership and operation, and will do so unless restrained and enjoined by the process of this court, to the great and irreparable loss and damage of plaintiffs, as hereinafter particularly alleged.

IX

That the total operated track mileage of the Southwestern System, all of which is operated by the defendant, El Paso & Southwestern [fol. 7] Railroad Company, as aforesaid, is 1139.9 miles, included wherein are 59.87 miles of railroad owned by the Chicago, Rock Island & Pacific Railway Company between Tucumcari, New Mexico, and Santa Rosa, New Mexico, and 32.27 miles of railroad owned by the Atchison, Topeka and Santa Fe Railway Company between Whitney Junction, New Mexico, and Burro Mountain Junction, New Mexico, operated by said El Paso & Southwestern Railroad Company; that the principal termini of the operated lines of the Southwestern System are Dawson, New Mexico, Tucson, Arizona, and Clifton, Arizona; that the principal termini of the owned lines of the Southwestern System are Dawson, New Mexico, Tucumcari, New Mexico, Santa Rosa, New Mexico, Clifton, Arizona, and Tucumcari, New Mexico; the exact location of said lines composing said Southwestern System being better described by delineation on the map hereto attached, marked Exhibit "B", to which reference is hereby made.

That the Southern Pacific System comprises, among others, lines of railroad running from points in Texas, to the City of El Paso, Texas, through said City of El Paso, Texas, in a generally easterly and westerly direction, and thence from said City of El Paso to and through Southern New Mexico, Southern Arizona, Southern California and thence to the City of Los Angeles, California, and other cities in California; that said system is owned and controlled either directly or indirectly by the defendant Southern Pacific Company; that said two systems parallel each other through and across the City of El Paso, Texas, and between the City of El Paso, Texas, and Tucson, Arizona, and the common points west of El Paso, Texas, are, among others, Deming and Lordsburg, New Mexico, and Kelton, Fairbanks, Benson and Tucson, Arizona, and said systems have been and are now in competition with each other for passenger and freight traffic of a transcontinental as well as of a local nature; that said systems between El Paso, Texas, and Tucson, Arizona, are parallel and competing lines of railroad within the meaning usually and customarily ascribed to those terms;—all of which will more fully appear by an inspection of the map hereto attached, marked Exhibit "B," and made

a part hereof, to which reference is hereby made; that said two lines [fol. 8] of railroad serve both Southern New Mexico and Southern Arizona, as well as the rapidly growing City of El Paso, Texas, a jobbing and shipping center, of developing proportions, now having a population of more than eighty thousand people; that because of the competition existing between the two systems the rivalry between them has been and is keen, and as a consequence the public has had better service for both passenger and freight traffic; that as a result of said competition, and as an outgrowth thereof, both lines of railroad have been active in solicitation of business for and through the sections traversed by their lines, at points in the East, and at all points between and including Chicago and Los Angeles, and at such intermediate places as El Paso, Texas, Tucson, Arizona, Deming and Lordsburg, New Mexico; that in order to secure and hold said business both lines of railroad have endeavored to give the maximum service and have advertised extensively and aided in upbuilding and promoting the principal communities on their lines, including the City of El Paso, Texas; that said competition has worked a gradual improvement in the treatment by both lines of the public and their practice, rules and regulations in regard to their methods of doing business, and it has facilitated the prompt handling of claims by shippers; that the Southwestern System originates a rich traffic for which both the Rock Island Railroad and the Southern Pacific compete eastbound, and it is that section parallel to the Southern Pacific as far as Tucson which originates a great deal of lucrative business; that the El Paso & Southwestern System was built for the purpose of bringing about competition in rates and service with the Southern Pacific System, and plaintiffs are informed and believe that as a resultant reduction in rates through the construction of said El Paso & Southwestern Railroad, said line of railroad was practically paid for within five years after its construction through savings in freight charges; that the said application of the Southern Pacific Company to the Interstate Commerce Commission had and has for its primary purpose the absorption by the Southern Pacific System of the Southwestern System, in order that conditions may be restored as near as may be before the construction of the Southwestern System and for the pur- [fol. 9] pose of suppressing the competition and rivalry that exists between the two systems, as aforesaid, to the end that said Southern Pacific may obtain a complete monopoly of the freight and passenger business to and through Southern New Mexico and Southern Arizona and for the purpose of depriving shippers and others of the privilege of shipping and traveling over one of two competing lines of railroad at their option.

XI

That for many years last past the defendant El Paso & Southwestern Railroad Company has maintained and now maintains its general offices at El Paso, Texas, as well as shops for the proper maintenance of its railroad lines; that in connection with said gen-

eral offices and said shops said defendant employs and furnishes employment to several hundreds of men and women who because of said employment are enabled to live in and about El Paso, Texas, and to support themselves and their families and those dependent upon them, which adds substantially to the population of the City of El Paso and puts in general circulation many thousands of dollars, all of which adds to the material happiness and prosperity of the community and increases the value of real and personal property, and consequently assists business enterprises within the city; that the Southern Pacific System likewise maintains shops at El Paso, Texas, but its general offices are at San Francisco, California, and if the two systems are fused into one it is the purpose of the defendant Southern Pacific Company, as plaintiffs are informed and believe, to consolidate the two shops into one and to either let many men out of employment or to remove them to other places, and to remove said general offices now maintained by the Southwestern to San Francisco or other points, thereby either depriving many persons of employment or removing them to other places, to the detriment of the community, as well as to those living in El Paso, Texas, and having business enterprises therein, including these plaintiffs.

[fol. 10]

XII

That plaintiffs, because of the nature of their business, have for several years last past sold, and are now selling furniture and goods, wares and merchandise to those dependent upon salaries paid by said El Paso & Southwestern Railroad Company to their employees, and if said consolidation and fusion is permitted they will be greatly injured by the loss of customers due to their, or those upon whom they are dependent, being deprived of their positions or because they are moved to other points; that if said consolidation, merger and fusion of said two systems takes place plaintiffs will also be greatly damaged and injured in their business and property by the loss to the general prosperity of the community, of which they are a part, due to the letting of men out of employment and the removal of other- with their families to distant places and the reduction in population that will necessarily ensue, and because of the decrease in the amount of expenditures in the community, which expenditures have heretofore contributed either directly or indirectly to the success of plaintiffs' said business;

That plaintiffs for several years last past have had and now have the option and right of routing their furniture purchased and sold, by way of the Southwestern System or the Southern Pacific System, and particularly with reference to shipments of furniture going from El Paso, Texas, to Southern New Mexico and to Southern Arizona, a privilege and right substantial and pecuniary value to plaintiffs, and if said merger is permitted to take place plaintiffs will be deprived of this privilege, right and option and will be compelled to ship over the Southern Pacific System alone, to the damage and injury of these plaintiffs; that plaintiffs, because of the com-

petition and rivalry existing between the two systems, have, along with the general public, had better service from said railroads and better treatment and will continue to have if said merger is not consum-ated, and plaintiffs allege that if said consolidation and merger is permitted that they and their business will be greatly injured and damaged by the depreciation in service and the increase in [fol. 11] rates and the laxity in handling of claims and traffic that is the natural result of the suppression of competition and the growth of monopoly; that if said merger is consummated, because of the consequent decrease in the population of the City of El Paso and the cutting down of the amount of money heretofore placed in circulation, property, both real and personal, belonging to plaintiffs, including said business owned by plaintiffs in the City of El Paso, will be depreciated in value and cause plaintiffs great financial and pecuniary loss;

All to the great and irreparable loss and damage of plaintiffs.

XIII

Plaintiffs allege and show that the said two Commissioners in making and issuing said findings, order and certificate, exceeded the power and authority delegated to them by the Interstate Commerce Act and the Transportation Act of 1920, and erred as a matter of law in the following particulars, to-wit:

That said three Commissioners are not the Interstate Commerce Commission and do not constitute a majority thereof, and are not empowered by law to approve the said applications, or to issue said certificate, the power to act under the said Acts of Congress being vested in the Interstate Commerce Commission, and plaintiffs allege, upon information and belief, that the Interstate Commerce Commission has not passed upon said applications, but said findings, order, and certificate were made by two Commissioners assuming to act for and in the name of the Interstate Commerce Commission without any lawful authority to do so, and that the said order and certificate purporting to have been issued by the Commission, Division 4, is the order of the Division composed of said three Commissioners, only two of whom concurred in said order and certificate, the third dissenting, and that said two Commissioners were not authorized by Act of Congress to exercise the powers delegated by Congress, not to a division of the Commission, but to the whole Commission; and plaintiffs aver, upon information and belief, that said Commission had not acted upon the findings, order and certificate of said two Commissioners, and they are therefore advised and believe, and so charge [fol. 12] that said order, findings and certificate are null and void and confer no authority upon the defendant railroads to carry out their said agreement, consolidation, and merger, and the issuance of stocks and bonds and the construction of extensions and branch lines.

XIV

Plaintiffs further show that if said findings, order and certificate are the acts of the defendant The Interstate Commerce Commission, that said The Interstate Commerce Commission in making and issuing said order and certificate exceeded the power and authority vested in it by law or otherwise, and that said Commission erred as a matter of law in the following particulars, to-wit:

A. That said Commission has in effect, and over the protest of the Sovereign State of Texas and the Railroad Commission of Texas, who were acting, among others, for and on behalf of these plaintiffs and other tax payers and shippers similarly situated, endeavored to override the Constitution and Laws of the State of Texas and to enter an order in defiance of the Constitution and laws of the State of Texas, in this:

That Section 5 of Article X of the Constitution of the State of Texas reads as follows:

"Sec. 5. No railroad or other corporation, or the lessees, purchasers or managers of any railroad corporation, shall consolidate the stock, property or franchise of such corporation with, or lease or purchase the works or franchise of, or in any way control any railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line."

That Section 6 of Article X of the Constitution of the State of Texas reads as follows:

"Sec. 6. No railroad company organized under the laws of this State shall consolidate by private or judicial sale or otherwise with any railroad company organized under the laws of any other State or of the United States."

That Articles 6604 and 6606, Revised Statutes of Texas, carry into effect said sections of the Constitution of Texas.

[fol. 13] That a portion of the Southwestern System included in the said order of the Commission lies between the City of El Paso and the middle of the Rio Grande River (the Texas-New Mexico boundary line) a distance of four miles, which portion is geographically parallel with that part of the Galveston, Harrisburg and San Antonio Railway extending likewise from El Paso to the Rio Grande River, which last road is a part of the Southern Pacific System, the said Galveston, Harrisburg and San Antonio Railway being controlled, either directly or indirectly, through ownership of its stock by the defendant Southern Pacific Company; that said four miles of railroad are a vital part of the two competing systems known as the Southwestern System and the Southern Pacific System, and said four miles of rail-

road are parallel and competing lines of railroad within the meaning of Section 5 of said Constitution.

That four miles of said railroad are owned by the El Paso and Southwestern Railroad Company of Texas, a Texas corporation, which is one of the corporations going to make up the Southwestern System, and under said order of the Commission the defendant Southern Pacific Company proposes to take over and acquire the stock of the said Texas corporation, thereby consolidating the Texas company, its stock, property and franchise, with the said Southern Pacific Company, a Kentucky corporation, in defiance of said sections of the Texas Constitution and the laws passed to carry same into effect, which said order is invalid and inoperative to authorize such a consolidation in violation of the said Constitution and laws.

That said order purports to authorize the defendant Southern Pacific Company to acquire the stock of that portion of the Southwestern System owned and controlled by the El Paso and Northeastern Railroad Company, a corporation organized under the laws of the State of Texas, consisting of about nineteen miles of railroad extending from the city of El Paso, Texas, to the Texas-New Mexico boundary line north of El Paso, thereby consolidating same with the Southern Pacific System, in violation of said sections of the Texas Constitution.

And plaintiffs here aver that the order of the Commission per- [fol. 14] mitting the acquisition by the Southern Pacific Company of the stock and control of the El Paso and Northeastern Railroad Company and the El Paso and Southwestern Railroad Company of Texas is null and void because in excess of the power of the Commission to override the Constitution and laws of the State of Texas.

B. That said Commission has in effect, by said order, endeavored to override the Constitution of the State of Kentucky and to permit the defendant Southern Pacific Railroad Company to acquire control of a parallel and competitive line of railroad, in violation of its charter powers, in this:

That section 201 of the Constitution of the State of Kentucky of 1891 reads as follows:

"Sec. 201. No railroad, telegraph, telephone, bridge or common carrier company shall consolidate its capital, stock, franchises, or property, or pool its earnings, in whole or in part, with any other railroad telegraph, telephone, bridge, or other carrier company owning a parallel or competing line or structure; or acquire by purchase, lease, or otherwise any parallel or competing line or structure or operate the same; nor shall any railroad company or other common carrier combine or make any contract with the owners of any vessel that leaves or makes port in this state or with any common carrier by which combination or contract the earnings of the one doing the carrying are to be shared by the other doing the carrying."

That said defendant Southern Pacific Company is a Kentucky corporation subject to said Constitution, and said provision, as plain-

tiffs are advised and believe, prohibits said defendant railroad corporation from consolidating or acquiring in the manner set forth in said order the Southwestern System, both a parallel and competing line and structure of railroad, and plaintiffs here charge that said order is null and void because in excess of the power and authority of the Commission, in that it is in defiance of said constitutional provision and violative of the charter powers of said defendant corporation, and an endeavor on the part of the Interstate Commerce Commission to deprive a sover-ign State of its control of a corporation organized under the constitutional authority of the State.

C. That said Commission has in effect, by its said order exceeded its power and authority in endeavoring to permit an acquisition, consolidation and merger in violation of both the spirit and letter of [fol. 15] the Transportation Act of 1920, in this, that said Act provides that any authorization looking to the consolidation of the railway systems of the United States shall see that competition shall be preserved as fully as possible, whereas the said order of the Commission suppresses and stifles competition between the two systems in the manner hereinbefore fully set forth; and plaintiffs here charge that said order is null and void and of no effect because in violation of the plain intent and purpose of said Transportation Act of 1920 and contrary to the power and authority conferred upon said Commission under said Act.

D. That said Commission has in effect, by said order, endeavored to permit the consolidation of two systems of railroad under the terms of the Transportation Act of 1920, in advance of the complete plan of consolidation called for by said Act, which plan has not as yet been promulgated by the said Commission nor adopted by it; that said authorization in advance of the complete plan is premature and in excess of the power conferred upon it by Congress, and the said order is therefore null and void and of no effect because in violation of the law.

E. That said Commission in effect by said order has endeavored to permit the fusing of the two systems of railroad ostensibly under the terms of Paragraph 2 of Article 5 of the Transportation Act of 1920, which paragraph confers no power on the Commission to permit an acquisition by one carrier of the control of another carrier, either under a lease or by the purchase of stock in a manner involving the consolidation of such carriers into a single system for ownership and operation, and plaintiffs here charge that the acquisition approved by the Commission in said order is a consolidation of said carriers into a single system for ownership and operation within the meaning of said Paragraph 2 of Article 5 of said Act, and said order and said approval are in consequence null and void and of no effect, because in excess of the power and jurisdiction of the Commission.

And plaintiffs here allege and charge that the El Paso & Southwestern Railroad Company has made the following public announcement of the intent and purpose of said merger:

[fol. 16] "The E. P. & S. W. Railroad Company and the Southern Pacific Railroad Company have agreed upon a basis of merger of the two companies under which the El Paso and Southwestern lines of railroad in New Mexico and Arizona will be operated as Southern Pacific lines, and the great resources of that railroad organization will, in the future, become interested in the development of the resources of New Mexico.

"Under such arrangements, the present owners of the El Paso and Southwestern Company are to retain all of their mining and other interests in the Southwest, including the Dawson coal mines and also become the largest owners of stock of the Southern Pacific Company held in any one ownership, with simple representation upon the Board of Directors and the Executive Committee of that Company, in order to guarantee for themselves, and for the people of New Mexico, West Texas and Arizona, such railroad policy as will best conduce to the interests of all. This announcement is made by the Public Relations Department in order that the public may fully know the facts direct from us."

Which said announcement is in accord with the terms of the agreement between said systems, hereto attached, marked Exhibit "A," and made a part of this Bill of Complaint, which the plaintiffs here pray the Court to inspect.

And plaintiffs further charge that the said order endeavors to permit the consolidation of said carriers into a single system for ownership and operation, in this: that the Southern Pacific Company is to own 100 per cent of the shares of stock evidencing ownership of the Southwestern System, and in addition it is to become the lessee of the various parts of that system, so that their operations may be intermingled with its own for purposes of management and accounting and the two systems will to all intents and purposes be fused, and plaintiffs aver that it was not the intent of Congress that the Commission should permit the fusing of railroads in the fashion contemplated by said order prior to the adoption of the complete plan of the Commission, and that said order is contrary to both the spirit and the letter of the law, and therefore in excess of the power of the Commission.

F. That said Commission, in effect, by said order has endeavored to permit the fusing of two systems of railroad as a piece-meal consolidation, on the assumption that it is in conformity and in harmony with a general tentative plan of the Commission adopted under Paragraph 5 of Section 5 of the Transportation Act of 1920, [fol. 17] whereas no complete final plan for the consolidation of the railroads of the United States into a limited number of competitive systems has yet been adopted by said Commission and there is no authority in the Commission at the present time to approve a consolidation of two carriers in the manner contemplated by said order in advance of the complete plan, nor is there any authority in said Commission to approve such a consolidation based upon said tentative plan, nor to approve a consolidation which involves only a

part of one of the competitive systems set forth in said tentative plan, without authorizing a consolidation of all the parts of said system, and plaintiff here charges that said order is not in accordance or in harmony with any tentative plan of said Commission, and plaintiffs aver that they are advised and believe that said order is null and void and of no effect because in violation of the plain intent and purpose of the Transportation Act of 1920, and contrary to the power and authority conferred upon said Commission under said Act.

G. That said Commission, by said order, in effect has endeavored to permit the fusing of two railroad systems in violation of the plain intent and purpose of paragraph 2 of section 5 of the Transportation Act of 1920, in that the order permits the suppression and stifling of competition, whereas said paragraph 2 of Section 5 authorizes the acquisition of control by one carrier of another only in [illegible] possible, and plaintiffs here charge that the said order is null and void and of no effect because beyond the powers and authority of the Commission derived from Paragraph 2 of Section 5 of said Act, or otherwise, and because in violation of the spirit and letter of the entire Transportation Act of 1920 and the Constitution and laws of the United States.

H. That said Commission, in effect, by said order, has endeavored to permit the fusing of two systems or railroad in competition with each other, in violation of the terms of the so-called Clayton Anti-Trust Act and particularly in violation of Section 7 thereof, which forbids one corporation engaged in commerce from acquiring di-
[fol. 18] rectly or indirectly the whole or any part of the stock or shares of capital of another corporation engaged in commerce, when the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tends to create a monopoly of any line of commerce, and plaintiffs aver that the acquisition authorized by said order substantially lessens competition between the two systems and said two defendant railway corporations and restrains commerce in the section served by said railroads and tends to create a monopoly of commerce, and plaintiffs therefore charge that said order is null and void and of no effect, and beyond the power and authority of the Commission.

I. That said order is null and void because not in the public interest, the public interest being declared by Constitutional and statutory enactments, Federal and State, in favor of the preservation of competition and against monopoly, said order tending to destroy competition and to foster monopoly and is therefore against public interest, notwithstanding the findings of the Commission to the contrary, and plaintiffs aver that said Commission erred in finding that said order was in the public interest, and plaintiffs further aver that said Commission was without power to enter said order

which suppresses competition, restrains trade and fosters monopoly, notwithstanding a finding that the acquisition approved is in the public interest.

J. That said order of said Commission is not authorized by any powers derived from the Constitution of the United States, in this, that it seeks to appropriate and does appropriate a corporation created by the State of Kentucky, to-wit: the Southern Pacific Company, and two corporations of the State of Texas, towit: the El Paso and Northeastern Railroad Company and the El Paso and Southwestern Railroad Company of Texas, to the purposes of the Interstate Commerce Commission, and to subject same to its jurisdiction, and to deprive the states creating the same of the control thereof, when in truth and in fact such power to so appropriate, if it exists at all, which is not admitted but denied, is possessed solely by the Con- [fol. 19] gress of the United States, and which said power has not been and cannot be delegated by the said Congress of the United States.

K. That said order is arbitrary, illegal and void, and beyond the power and authority of said Commission to make, and violative of the contract and constitutional rights of plaintiffs, and deprives plaintiffs of property and rights without due process of law; that the same is unreasonable and confiscatory, contrary to the evidence submitted to said Commission, contrary to well-known facts of which the Commission was bound to take judicial notice, not supported or warranted by the evidence submitted to said Commission, and not based upon or supported by sufficient findings of fact by the Commission to authorize the said order.

XV

Notwithstanding the matters and things hereinbefore alleged, the defendants and each of them is, threatening to enforce the order complained of above, and unless restrained and enjoined by this Court will enforce said order, and defendant railroad companies will proceed on and after October 30, 1924, to consummate the said agreement marked Exhibit "A" hereto attached, and consolidate the two systems and carry out the terms of said order, to the great and irreparable damage of plaintiffs, as hereinabove alleged; that plaintiffs have no adequate remedy at law for the redress of the injuries to be inflicted upon them by the enforcement of the order aforesaid, and it is necessary to the adequate protection of plaintiffs that equity should intervene with the power of injunction, and that preliminary and permanent injunctions and temporary restraining orders be granted against the enforcement of the order above complained of, and the acquisition of control by one carrier of the other carrier referred to in said order.

XVI

That the State of Texas and the State of Kentucky have not au- [fol. 20] thorized the proposed acquisition of control by said Southern Pacific Company of the Southwestern System, or any part thereof.

Wherefore, and inasmuch as plaintiffs have no plain, speedy and adequate remedy at law in the premises, plaintiffs pray:

First. That the Court grant unto plaintiffs their right of subpœna, directed to the defendants and each of them, requiring and commanding them and each of them at a certain time, and under a penalty to be therein specified, to be and appear before this Court and answer the matters in this Petition and Bill of Complaint set forth, but not under oath (an answer under oath being hereby expressly waived), and to stand and abide by and perform such orders, directions and decrees as shall be made herein.

Second. That this court find and decree that the said order of the Interstate Commerce Commission herein complained of is unwarranted, illegal and void, and that said order, insofar as it seeks to permit the acquisition by the Southern Pacific Company of the Southwestern System, be enjoined, set aside, annulled and suspended, and that the threatened action of said Southern Pacific Company in attempting to acquire the control of said Southwestern System be enjoined.

Third. That a restraining order and a preliminary or interlocutory injunction be granted, restraining and enjoining the defendants and each of them, their agents and representatives, and all persons acting through or under them, or any of them, pending this litigation, from enforcing or attempting to enforce the said order, or from taking any action looking to the carrying out of the said contract dated the 20th day of June, 1924 (Exhibit "A"), or from taking any action looking to the acquisition by the defendant Southern Pacific Company of the ownership or control of the Southwestern System.

Fourth. That at the conclusion of this litigation a final injunction be granted, permanently enjoining the enforcement of the said order of the Interstate Commerce Commission and enjoining the Southern Pacific Company from carrying out said contract, and from acquiring or taking over the ownership and control of the said Southwest-
[fol. 21] ern System.

Fifth. That the plaintiffs have such other, further and additional relif as to this Court may seem equitable in the premises, together with costs of suit.

Home Furniture Company, a Copartnership, and George H. Park and James F. Kilcrease, Individually and as Partners in Trade, Doing Business under the Firm Name and Style of the Home Furniture Company, Plaintiffs, by Jos. U. Sweeney and Edward C. Wade, Jr., Attorneys and Solicitors for Plaintiffs. Jos. U. Sweeney and Edward C. Wade, Jr., El Paso, Texas, Solicitors for plaintiffs.

UNITED STATES OF AMERICA,
Western District of Texas,
El Paso Division:

Sworn to by George H. Park et al. Jurat omitted in printing.

[fol. 22] EXHIBIT "A" TO BILL OF COMPLAINT

Agreement made this 20th day of June, 1924, by and between El Paso & Southwestern Company, a corporation of the State of New Jersey, hereinafter called "Southwestern Company" and Southern Pacific Company, a corporation of the State of Kentucky, hereinafter called "the Southern," Witnesseth:

Southwestern Company owns all of the issued and outstanding capital stock of El Paso & Southwestern Railroad Company, a corporation of Arizona, hereinafter called "the Southwestern Railroad," of the Burro Mountain Railroad Company, a corporation of New Mexico, of the Arizona & New Mexico Railway Company, a corporation of New Mexico and Arizona, hereinafter called "the Arizona," and of the El Paso & Northeastern Company, a holding corporation of New Jersey, hereinafter called "the Northeastern Company." The Southwestern Railroad owns all of the issued and outstanding capital stock of the El Paso & Southwestern Railroad Company of Texas. The Northeastern Company owns all of the issued and oustanding capital stock of the El Paso & Rock Island Railway Company, a corporation of New Mexico, of the El Paso & Northeastern Railway Company, a corporation of New Mexico, of the Alamogordo & Sacramento Mountain Railway Company, a corporation of New Mexico, of the El Paso & Northeastern Railroad Company, a corporation of Texas and of the Dawson Railway & Coal Company, a holding company of New Jersey, hereinafter called "the Dawson." The Dawson owns all of the issued and outstanding capital stock of the Dawson Railway Company, a corporation of New Mexico. The Southwestern Company is also the legal and equitable owner of all of the issued and outstanding capital stock of the Tucson, Phoenix & Tide Water Railway Company, a corporation of Arizona, hereinafter called "the Tide Water," which owns certain real estate, franchises and rights of way in the City of Phoenix, Arizona, and [fol. 23] elsewhere, and of all of the issued and outstanding capital stock of the Nacozari Railroad Company, hereinafter called "the Nacozari," a New Jersey corporation, which owns and controls through stock ownership a certain railroad beginning at Agua Prieta, Mexico, and extending thence in a southerly direction to Nacozari, Mexico, together with certain lands and franchises in Guaymas, Mexico.

All of the railways and railway properties of all of the above-named corporations, other than the Tide Water and Nacozari, are now being operated by the Southwestern Railroad, and together constitute a system of railways reaching from Dawson, New Mexico, to Tucumcari,

New Mexico, and from Santa Rosa, New Mexico, to Tucson, Arizona, together with branch lines connecting therewith and reaching other points in the States of Arizona and New Mexico, in addition to which the Southwestern Railroad operates a line of railroad owned by the Chicago, Rock Island & Pacific Railway Company between Tucumcari, New Mexico, and Santa Rosa, New Mexico, under the terms of a certain operating contract between the Chicago, Rock Island & Pacific Railway Company and the New Mexico Railway & Coal Company (now the Northeastern Company), dated the 2nd day of May, 1907, the term whereof was extended by a supplemental agreement of June 1, 1920, now in process of assignment to the Southwestern Railroad, and which it is contemplated shall be assigned to the Southern upon consummation hereof. All of said railway properties so operated by the Southwestern Railroad, together with the properties of the Nacozari and the Tide Water, are hereinafter collectively called "the Southwestern System," and the several corporations above named, through the ownership of whose stock the Southwestern Company owns or controls said system are hereinafter collectively called "Southwestern Subsidiaries."

Southwestern Company is also the owner of First and Refunding Mortgage Bonds of the Southwestern Railroad of the face value of [fol. 24] $5,055,000, of bonds of the Arizona of the face value of $1,294,533, which have been tendered in exchange for First and Refunding Mortgage Bonds of the Southwestern Railroad in accordance with a certain Refunding plan approved by the Interstate Commerce Commission hereinafter called "the Commission," by an order entered by it on December 26, 1923, in Finance Docket 3135, and is entitled to receive First and Refunding Bonds of the Southwestern Railroad of the face value of $2,048,000 in part payment for equipment transferred to the Southwestern Railroad, in accordance with said order and Refunding Plan. There are no other bonds or other evidences of funded indebtedness of the Southwestern Railroad. Bonds or other evidences of funded indebtedness of the Southwestern Subsidiaries are owned in part by the general public and in part by corporations comprising the Southwestern System.

It is the intended purpose and effect of this agreement that on the consummation thereof the Southern will have acquired all of the Southwestern Company's interest in the Southwestern System through the exchange of securities hereinafter provided, and all of the other assets of the Southwestern Company, whether specifically described above or not, including any property held in trust for it, and to effectuate such purpose and in consideration of the premises and of the mutual promises and agreements herein contained, the parties hereto agree as follows:

1. Subject to the approval of the Commission to be obtained as hereinafter provided, the Southwestern Company agrees to assign and transfer to the Southern all of said stocks, bonds and other securities of and all book accounts, claims against or other interest in Southwestern System now owned by or held in trust for the South-

western Company, and all other property of any kind whatsoever owned by — or held in trust for the Southwestern Company, in exchange for 280,000 shares of the common stock of the Southern of [fol. 25] the par value of $100 each, to be issued at par and Collateral Trust Bonds of the Southern of the face value of $29,400,000, to be issued at par, and the Southern agrees to accept the aforesaid stocks, bonds and other property and assets of the Southwestern Company, and to issue in exchange therefor its common stock and Collateral Trust Bonds in the amounts mentioned, and undertakes to take the necessary proceedings to create and to apply to the Commission for authority to issue said stock and bonds, and to apply to the New York Stock Exchange for listing thereon.

2. The Southwestern Company guarantees that there is no capital stock of Southwestern Subsidiaries outstanding in the hands of the general public, and that the outstanding bonds or other evidences of funded indebtedness of itself and of the Southwestern Subsidiaries in the hands of the general public do not exceed $9,100,000, and if on the 30th day of April, 1924, the amount thereof was more or less than the foregoing sum, the stocks and bonds to be issued by the Southern hereunder shall be correspondingly decreased or increased, such decrease or increase to be divided equally between the stocks and bonds to be issued. It is further agreed that for the purposes of said adjustment bonds in the sinking fund of the Dawson are not to be considered as outstanding in the hands of the general public. The Southwestern Company also agrees that it and its subsidiaries will not sell, pledge or otherwise dispose of the stocks or bonds owned by them at the time of the execution of this agreement and generally described in the preamble hereof, except in connection with exchange of securities provided for by the Southwestern Refunding Plan.

3. To the extent that exchange of securities under the Southwestern Refunding Plan shall have been accomplished prior to the date of transfer of securities, as hereinafter provided, securities received by the Southwestern Company in such exchange shall be delivered by it [fol. 26] to the Southern, and received by the latter in lieu of the securities for which exchanged.

4. The aforesaid Collateral Trust Bonds shall be issued in denominations of $1,000, shall be dated the first day of May, 1924, shall mature the first day of May, 1944, shall bear interest at five per cent (5%), payable semi-annually, shall be redeemable on any semi-annual interest date at par and accrued interest on ninety (90) days' notice, shall be issued under a Trust Indenture in form approved by counsel of Southwestern Company, and shall be secured by a pledge with the trustee thereunder of collateral securities to be agreed upon by the parties hereto as soon as possible. In case the parties hereto cannot agree upon the value or class of collateral to be deposited under the trust indenture, it is agreed that collateral shall be selected from the statement of collateral, as shown in Exhibit 1, hereto attached, which shall be submitted to a board of independent bond experts (one to be chosen by the Southern, one by the Southwestern

Company, and, in the event of disagreement, the two so selected to choose a third member), whose opinion as to the value and class of collateral to be originally deposited under the trust indenture shall be final and shall be accepted by both sides. It is understood that not more than fifty per cent (50%) of the collateral under the trust indenture at any time shall be in any one security; that the total collateral, whether original or substituted, shall at the time of submission to the mortgage be of a fair or appraised value at least twenty-five per cent (25%) in excess of the face value of the aforesaid collateral trust bonds issued and outstanding; and that collateral substituted for collateral previously deposited shall be of a fair or appraised value at least equal to the last previously appraised value of the securities to be withdrawn. So long as there shall be no default in the payment of the principal or interest of any of the said Col- [fol. 27] lateral Trust Bonds, the Southern shall be entitled (1) to receive all interest paid on any of the pledged securities, and (2) to withdraw any of the pledged securities and to substitute therefor other securities of at least equal value.

5. The Southern accepts as a fact the representation of the Southwestern Company that the property of the Dawson Fuel Company, the stock and bonds of which of the face value of $1,000,000 each are pledged among other collateral as security for the mortgage bonds of the Dawson, was transferred to Stag Canon Fuel Company, a subsidiary of Phelps-Dodge Corporation, a New York corporation, on or about the 15th day of April, 1908. It is further understood that under the terms of the amortization clause of the mortgage of the Dawson it is provided that a royalty of 5c. per ton shall be paid by or on behalf of the Dawson Fuel Company annually for the creation of a sinking fund for the retirement of said Dawson bonds, and that the interest on the bonds purchased and held in the sinking fund shall likewise be applied to said amortization. It is understood and agreed that until amortized through sinking fund payments the said bonds of the Dawson shall not be cancelled or retired, and the Southwestern Company guarantees that the royalty payments hereinbefore described shall be made by Stag Canon Fuel Company or such other company as may own or operate the said Fuel Company, and agrees to cause to be executed in form satisfactory to counsel for the Southern any agreements or contracts by and between the Stag Canon Fuel Company or such other owner or operator of said Fuel properties, and the Dawson, necessary to effectuate such purpose. It is understood and agreed that upon the conclusion of the amortization of the said Dawson bonds the stock and bonds of the Dawson Fuel Company shall be delivered to Phelps-Dodge Corporation, the present owner of said Dawson Fuel Company properties, or to its nominee. [fol. 28] It is likewise understood and agreed that upon retirement of the now outstanding bonds of the New Mexico Railway & Coal Company, the stocks and bonds of the New Mexico Fuel Company pledged thereunder as security shall be delivered to Phelps-Dodge Corporation or to its nominee.

6. The Southern will as soon as practicable after the execution of this agreement prepare and file with the Commission an application for authority to acquire control of the Southwestern System, in accordance with this agreement, and will diligently prosecute the same, and the Southwestern Company will render any assistance requested by the Southern in connection with said application and co-operative with it in securing favorable action thereon. It being the intention of the Southern to operate the railroads now operated by the Southwestern Railroad in the name of the Southern as lessee, the Southwestern Company will cause all necessary corporate action to be taken by the Southwestern Subsidiaries either for the assignment to the Southern of the existing leases to the Southwestern Railroad or for the execution of new leases to the Southern at the election of the Southern, in order to enable the Southern to include in its application to the Commission for acquisition of control an application for authority to operate the railways of the Southwestern System in its own name as lessee, and to carry said leasing plan into effect if authorized by the Commission.

7. Pending final consummation of this agreement the Southwestern System shall continue to be operated by its present organization. During said period of operation the operation of said properties will be conducted in a normal and efficient manner and will be fully maintained in accordance with and up to the Southwestern Company's standard; no unusual or long-term contracts shall be made without the approval of the Chairman of the Executive Committee of the Southern; no expenditures for new equipment or additions and [fol. 29] betterments in excess of Fifty Thousand Dollars ($50,000) for any single job or purchase shall be made without the approval of said Chairman, except that the Southern accepts the fact that three (3) baggage buffet cars, one (1) dining car, six (6) mountain type locomotives and four hundred (400) fifty-ton box cars have been ordered for delivery after July first in addition to which two steel club cars are being converted into dining cars, all at an aggregate cost of $1,683,000, to the delivery and completion of which the Southern agrees without further approval of said Chairman. Any funds required to maintain operations and make necessary additions and betterments including said equipment will be provided by the Southern. Any such advances by the Southern will be returned to it promptly with interest at six per cent (6%) per annum, in the event that this agreement is terminated by reason of the failure of the Commission to render a satisfactory order of authorization and approval as hereinafter defined.

8. Upon consummation hereof the Southwestern Company agrees that the directors and officers of the Southwestern Subsidiaries shall submit their resignations, to take effect at the option of the Southern.

9. The Southern accepts the fact that under the authority of an order of the Commission dated December 26, 1923, the Southwestern Company was authorized to proceed with a refunding of the obligations of the Company and of its subsidiaries and the simplification

of stock ownership, and, further, that the Southwestern Company is now engaged in said refunding operations. The Southern agrees that the Southwestern Company may carry out said Refunding Plan pending transfer of securities hereunder. Any substantial deviation therefrom pending consummation of this agreement shall be approved in writing by both parties hereto.

10. Upon consummation hereof and exchange and transfer of se- [fol. 30] curities the Southern will assume all outstanding pension obligations of the Southwestern Company or the Southwestern Subsidiaries towards employees then already pensioned, and will admit employees of the Southwestern System retained in the service of the Southern to the pension privileges of the Southern, in connection with which years of service with the Southwestern System shall count to the same extent as though performed upon the lines of the Southern.

11. Upon the making of an order by the Commission authorizing acquisition of control of the Southwestern System and operation under lease by the Southern, in accordance with the terms of this agreement, and with provisions, if any, which are in essential form and substance satisfactory to the Southern, the transfer and exchange of securities herein provided, including the cash and all other assets and accounts of the Southwestern Company, shall be effected with all convenient speed after said order shall have become effection, at the office of the Southern in New York City, and an accounting shall be had for the period beginning May 1, 1924, and ending on the last day of the month during which the said order becomes effective (said period being hereinafter referred to as the interim period) as follows:

(a) The accounts of the various companies composing the Southwestern System shall be kept during the entire interim period in accordance with the accounting regulations of the Commission and the usual and established accounting practices of the said companies;

(b) The Southwestern Company shall be credited with:

(1) An amount equal to one-half of the consolidated net income (determined as provided in paragraph (a) above, and classified according to Schedule 300-I in the form of annual report to the Commission) of the interim period, of the various companies composing [fol. 31] the Southwestern System, it being understood that all dividends paid or declared by the Southwestern Subsidiaries and other debits and credits to said income accounts during said period arising from inter-company transactions between the various companies composing the Southwestern System, such as rentals for leased lines and equipment, interest on bonds, etc., will be included in determining the amount of the said net income of the Southwestern System of the interim period;

(2) One-half of the face amount of all coupons detached from the said Southern Collateral Trust Bonds that matured during the

interim period, plus one-half of the interest accruing to the close of the interim period on coupons attached to the said bonds; and

(3) One-half of the interest on $28,000,000, representing the par value of 280,000 shares of stock of the Southern delivered to the Southwestern Company, from May 1, 1924, to the close of the interim period, at the same rate or rates per cent. per annum as paid on the outstanding capital stock of the Southern and applicable to the same period, with proper adjustment for full interest and/or dividends thereafter, or for dividends, if any, accruing during the interim period on the stock delivered to the Southwestern Company, it being understood that, for the purposes of said accounting, dividends accrue ratably over the three months period ending with the close of the month next preceding the month in which such dividends are paid.

(c) The Southwestern Company shall be debited with:

(1) The amount of dividends (which shall not exceed 7% per annum) paid or declared during the interim period on the stock of the Southwestern Company;

(2) The full amount of interest accruing to close of the interim [fol. 32] period on unmatured coupons attached to the Southern Collateral Trust Bonds delivered in exchange for the property and securities of the Southwestern Company.

Payment of the net balance due from either party to the other, as determined by said accounting, shall be made by it in cash promptly upon completion of said accounting.

12. In the event that the Commission shall not approve the acquisition of control hereby contemplated by an order as defined in paragraph 11 hereof, this agreement shall terminate.

In witness whereof the parties have caused this agreement to be signed by their proper officers thereunto duly authorized and their respective corporate seals to be hereunto affixed and attached by their respective Secretaries or Assistant Secretaries the day and year first above written. Executed in triplicate.

El Paso & Southwestern Company, H. N., G. N., by T. M. Schumacher, President. Attest: George Notman, Secretary. (Seal.) Southern Pacific Company, by J. Kruttschnitt, Chairman of Executive Committee. Attest: Hugh Neill, Secretary. (Seal.)

EXHIBIT "B"

Southern Pacific Company

Map of El Paso & Southwestern System to be Merged with Southern Pacific Lines

(Said map omitted by stipulation of counsel.)

[fol. 33] EXHIBIT "C" TO BILL OF COMPLAINT

INTERSTATE COMMERCE COMMISSION

Finance Docket, No. 4164*

CONTROL OF EL PASO & SOUTHWESTERN SYSTEM AND SECURITIES ISSUE BY SOUTHERN PACIFIC

Submitted September 29, 1924. Decided September 30, 1924

1. Certificate issued authorizing the Arizona Eastern Railroad Company to construct, as extensions of its existing lines of railroad, a line of railroad in Maricopa and Yuma Counties, and a line of railroad in Pinal and Maricopa Counties, together with a branch in Pinal County, all in the State of Arizona.

2. Acquisition by the Southern Pacific Company of control of the carriers comprising the El Paso & Southwestern System by stock ownership through purchase of the interest of the El Paso & Southwestern Company therein and by lease approved and authorized, subject to certain conditions.

3. Authority granted to the Southern Pacific Company to issue not exceeding $28,000,000 of its common capital stock and not exceeding $29,400,000 of 5 per cent 20-year collateral trust bonds in payment for the interest of the El Paso & Southwestern Company in the companies comprising the El Paso & Southwestern System and in the Nacozari Railroad Company.

4. Request of Arizona Eastern Railroad Company for permission to retain excess earnings denied.

J. P. Blair, William F. Herrin, Cravath, Henderson & de Gersdorff, [fol. 34] L. J. Spence and Fred H. Wood for Southern Pacific Company and Arizona Eastern Railroad Company, applicants.

Clark & LaRoe, William Church Osborn, W. A. Hawkins, and Edgar E. Clark for El Paso & Southwestern Railroad Company, applicant, and for El Paso & Southwestern Company.

D. F. Johnson, Chairman, and Amos A. Betts, Commissioner, Arizona Corporation Commission, for Arizona Corporation Commission, intervenor.

Hugh H. Williams, Chairman, State Corporation Commission of New Mexico, and E. R. Wright for State Corporation of New Mexico, intervenor.

Alexander B. Baker for Governor of Arizona.

Kirke T. Moore for Tucson Chamber of Commerce, Deming Chamber of Commerce, Lordsburg Chamber of Commerce, and Douglas Chamber of Commerce and Mines; Kirke T. Moore and F. A. Jones for Southern Arizona Traffic Association; F. A. Jones and H. B. Wilkinson for Tidewater Main Line Association, Chamber of Commerce of Phoenix and town of Mesa; F. A. Jones for Ray Consolidated Copper Company; H. B. Wilkinson for town of Tempe; Alexander B. Baker and Louis B. Whitney for city of Phoenix; Alexander B. Baker for Salt River Valley Water Users Association; E. L. Green for Board of Supervisors of Pinal County, and Chamber of Commerce of Florence; Sam G. Bailie for town of Chandler, Chamber of Commerce of Chandler, and Gila Valley Unit of the Main Line Association; J. L. B. Alexander, for county of Maricopa; and P. G. Spilsbury for Arizona Industrial Congress, interveners.

This report also embraces Finance Docket No. 4148, Construction of Extensions and Branch Line by Arizona Eastern Railroad Company.

F. A. Jones and H. B. Wilkinson for Mesa Chamber of Commerce; F. A. Jones for Ray & Gila Valley Railroad Company; and E. L. Green for Casa Grande Chamber of Commerce.

[fol. 35] W. A. Keeling, Attorney General, Frank M. Kemp and R. E. Seagler, Assistant Attorneys General of the State of Texas, for State of Texas and Railroad Commission of Texas; Walter W. Page for Gilbert Chamber of Commerce; Andrew M. McDearmott, in his own behalf, and Jos. U. Sweeney and Edward C. Wade, amici curiae, protestants.

Report of the Commission

Division 4, Commissioners Meyer, Eastman, and Potter

By Division 4:

By their joint application filed herein on July 1, 1924, the Southern Pacific Company and the El Paso & Southwestern Railroad Company, hereinafter called respectively the Southern Pacific and the Southwestern, carriers by railroad subject to the interstate commerce act, have applied under paragraph (2) of section 5 of the act for an order approving and authorizing acquisition by the Southern Pacific of control of the El Paso & Southwestern System, hereinafter called the Southwestern System, by stock ownership through purchase of the interest therein of the El Paso & Southwestern Company, hereinafter called the Southwestern Company, and by lease; and the Southern Pacific has applied under the provisions

of section 20a of the act for authority to issue $28,000,000 of common capital stock and $29,400,000 of 5 per cent 20-year collateral-trust bonds. By a separate application filed on the same date the Arizona Eastern Railroad Company, hereinafter called the Arizona, a common carrier by railroad subject to the act, has requested a certificate that the present and future public convenience and necessity require the construction by it (1) of a line of railroad from a connection with the main line of the Southern Pacific Railroad Company at or near Picacho, Pinal County, northerly to a crossing of the Gila River, thence northwesterly to a connection with [fol. 36] the Chandler branch of the Arizona at or near Chandler, Maricopa County, a distance of 50.5 miles, together with a branch connecting with the proposed line near Gila River and extending easterly to the city of Florence, a distance of 7 miles; and (2) a line of railroad extending from Hassayampa, Maricopa County, at the terminus of a branch of the Arizona, southwesterly to a connection with the main line of the Southern Pacific Railroad Company at or near Dome, Yuma County, a distance of 115 miles, all in the State of Arizona, the lines to be constructed as extensions of the existing lines of the Arizona. Permission is also requested under paragraph (18) of Section 15a of the act to retain the excess earnings from the proposed new lines of railroad for a period of 10 years.

The city of El Paso and the El Paso Freight Bureau filed an intervening petition protesting against acquisition by the Southern Pacific of control of the Southwestern System. This petition was subsequently withdrawn. The Attorney General of the State of Texas has filed a protest and certain representations with respect to the Texas companies embraced in the Southwestern System and has requested that any order entered by us be so conditioned as not to violate the provisions of the constitution and statutes of that State relating to consolidation of Texas companies with foreign corporations, the acquisition of control by one corporation of another corporation owning or having under its control a parallel or competing line, and the leasing of railroads of Texas corporations by foreign corporations. Protests were also filed by certain individuals. A hearing was held on September 8, 1924. None of the protestants was represented at the hearing, but intervening petitions in support of the applications were filed and appearances entered on behalf of the Arizona Corporation Commission, the State Corporation Commission of New Mexico, and a number of cities, towns, and commercial or- [fol. 37] ganizations of communities served by the applicants and representations in favor of granting the authority sought were made on behalf of the Governor of Arizona. Due consideration has been given the representations of the protestants.

The Southwestern System embraces the following railroad companies: the El Paso & Southwestern Railroad Company, the El Paso & Southwestern Railroad Company of Texas, the Burro Mountain Railroad Company, the Arizona & New Mexico Railway Company, the Dawson Railway Company, the El Paso & Northeastern Railway Company, the El Paso & Rock Island Railway Company, the Ala-

mogordo & Sacramento Mountain Railway Company, the El Paso & Northeastern Railroad Company and the Tucson, Phœnix & Tidewater Railroad Company. All of the issued and outstanding capital stock and a portion of the outstanding bonds of the companies embraced in the system are owned directly or indirectly by the Southwestern Company. Of the railroad companies of the System only the Southwestern is engaged in transportation of passengers and property in interstate commerce. This company in addition to operating its own lines, operates under lease all of the existing railways of the other Companies of the System.

The Tucson, Phœnix & Tidewater Railroad Company neither owns nor operates any line of railroad. Its property consists of certain real estate, franchises, and rights of way in the city of Phœnix, Ariz., and elsewhere. A description of the properties of the remaining companies embraced in the System, the interest of the Southwestern Company therein, and the inter-corporate relations existing between the various carrier and non-carrier companies comprising the System are set forth in our report in Control and Securities of E. P. & S. W. Subsidiaries, 86 I. C. C. 122. By our order entered December 26, 1923, in that proceeding we authorized the Southwestern Company to acquire direct control of certain of its subsidiaries, at that time controlled indirectly, and authorized the [fol. 38] Southwestern to acquire control of certain of the subsidiaries by purchase of stock and by lease and to issue securities in connection with such acquisition, in payment for certain equipment, and for the purpose of refunding obligations of other companies of the System.

The Southern Pacific proposes to acquire control of the Southwestern System (a) by stock ownership through purchase of the interest of the Southwestern Company therein pursuant to an agreement dated June 20, 1924, between the Southern Pacific and the Southwestern Company, a copy of which was filed with the application, and (b) by lease from the Southwestern of the lines of railroad owned by it and by assignment from the Southwestern to the Southern Pacific of the leases whereby the Southwestern now operates the existing railways of the Southwestern System not owned by it, including in the assignment any and all trackage and operating rights of the Southwestern over other lines. The provisions of the lease from the Southwestern to the Southern Pacific will be substantially the same as those of the leases approved and authorized in Control and Securities of E. P. & S. W. Subsidiaries, supra. Under the agreement dated June 20, 1924, the Southern Pacific will also acquire control of the Nacozari Railroad Company. This company is now controlled through stock ownership by the Southwestern Company, and owns and controls by stock ownership a railroad beginning at Agua Prieta, and extending thence southwesterly to Nacozari, together with certain lands and franchises in Guaymas, all in Mexico.

In payment for the interest of the Southwestern Company in the Southwestern System and in the Nacozari Railroad Company the

Southern Pacific proposes to issue at par $28,000,000 of common capital stock consisting of 280,000 shares of the par value of $100 each, and $29,400,000, principal amount, of collateral-trust bonds.

The bonds are to be dated May 1, 1924, to mature May 1, 1944, [fol. 39] to bear interest at the rate of 5 per cent per annum, payable semiannually on May 1 and November 1 in each year, to be redeemable on any semiannual interest date at par and accrued interest on 90 days' notice to be issued under a trust indenture dated May 1, 1924, made by the Southern Pacific to the Hanover National Bank of the City of New York, trustee, and to be secured by pledge thereunder of the collateral securities described in the indenture. The common stock and collateral trust bonds are to be issued directly to the Southwestern Company in payment for its interest in the properties to be acquired.

The book value of the railway properties and other assets of the Southwestern System companies as of April 30, 1924, was $71,086,202.39, and bonds of certain of the companies outstanding in the hands of the public amounted to $9,098,000, making the net book value of the Southwestern Company's interest in the properties, $61,988,202.39. The obligation to continue royalty payments to provide a sinking fund for retiring certain of the bonds is guaranteed by the Southwestern Company. The value of these royalty payments, said to be approximately $1,000,000, will reduce by that amount the funded indebtedness of the Southwestern System companies and increase the book value of the properties to be acquired to approximately $62,988,000. Upon the facts of record the consideration to be paid for the properties appears to be reasonable. Our tentative valuation of the properties has not been completed and nothing herein shall be construed as a determination of such value for rate making purposes.

The lines of the Southwestern System are intermediate between the lines of the Southern Pacific, and the lines of the Chicago, Rock Island & Pacific Railway System, hereinafter called the Rock Island. The lines of the three systems constitute one of the principal direct routes between southern California and the Missouri River and Chicago, and are included in the Southern Pacific-Rock Island System [fol. 40] in the grouping of railroads under the tentative plan for consolidation of railroad properties promulgated by us under date of August 3, 1921. Consolidation of Railroad Properties, 63 I. C. C. 455. Acquisition of control of the Southwestern System by the Southern Pacific is in harmony with this plan. It will result in direct physical connection between the lines of the Southern Pacific and the Rock Island, will assure the continuance of this route, and will increase its competitive strength as compared with the routes of the Santa Fe and Union Pacific. While the lines of the Southern Pacific and Southwestern System west of El Paso may be said to be parallel they serve different communities and industrial sections. The points at which the two systems meet are important points of interchange of a large traffic to and from communities served by one but not the other. Better coordination and more efficient and economical operation will follow as to this traffic and as to trans-

continental traffic in connection with the Rock Island, and relations to the traveling and shipping public and to public authorities will be simplified and improved.

The Southern Pacific has long had in contemplation double tracking its lines between Tucson and El Paso, the necessity for which appears to be now imminent. By acquiring the lines of the Southwestern System, the Southern Pacific will secure substantially all the advantages of double track operation on a more favorable location than would result from double tracking its existing line. This would be accomplished without any capital outlay for new construction. Moreover, the control sought will result in operating economies and make possible the unification of standards and practices. One of the principal economies to be effected by the proposed acquisition of control will be in the reduction of unbalanced traffic. In 1923 the excess of eastbound traffic over westbound on the South-
[fol. 41] ern Pacific between Tucson and El Paso amounted to 90,362,000 gross ton-miles. During the same year on the Southwestern between the same points there was an excess of westbound traffic over eastbound of 70,335,000 gross ton-miles, making the unbalanced traffic under separate operation 160,697,000 gross ton-miles. Under merged operation, without any increase in train service, the unbalanced traffic would have amounted to only 20,027,000 gross ton-miles. The annual saving to be accomplished through better balancing of traffic is estimated at $662,000. The annual saving in administration and operating expenses under unified operations is estimated at $1,487,860, and in capital and maintenance charges through avoidance of double tracking between Tucson and El Paso at $1,954,100, making a total estimated annual saving of $3,430,950.

It is shown that the traffic on the existing main line of the Southern Pacific between Tucson and Yuma is so great that it will soon be impossible to handle it all on a single track. The proposed lines of the Arizona in connection with its existing lines would permit the diversion of part of this traffic over a new low grade route, would obviate the necessity of double tracking the existing route, would provide a shorter and more economical route for traffic to and from Phoenix, the Salt River Valley, the Ray-Hayden Mining District, and other points on the Phoenix division of the Arizona, and open new territory susceptible of agricultural and mining development. Construction of the proposed lines and control of the Southwestern System will give the Southern Pacific a second track or line from El Paso to Yuma, except between Picacho and Tucson, distance of 40 miles, and between Dome and Wendon, a distance of about 15 miles.

It is estimated that the reduction of curvature and grades on the new route, the lessening of interference with train movement, the reduced train and car mileage on traffic to and from points on the [fol. 42] Phoenix division, the avoidance of double tracking, and other advantages would result in an annual saving of $902,630. The saving thus to be effected is equivalent to a return of 6.4 per cent per annum on the cost of constructing the new lines and im-

proving the existing lines, which is estimated at $14,138,000. The net saving resulting from constructing the proposed lines rather than than double tracking the existing main lines of the Southern Pacific between Dome and Picacho is estimated at $125,040 per annum.

The proposed lines are to be constructed by the Arizona but operated by the Southern Pacific under the proposed lease submitted to us in the matter of the application of the Southern Pacific Company to acquire control of the Arizona Eastern Railroad Company and the Phoenix & Eastern Railroad Company by lease, filed under Finance Docket No. 3340, now pending. The Southern Pacific owns practically all the capital stock of the Arizona. The estimated cost of constructing the proposed lines is $12,752,060. The necessary funds for construction will be advanced by the Southern Pacific which is to be reimbursed by sale of first and refunding mortgage 5 per cent gold bonds of the Arizona, authority to issue which will be asked later. The Arizona proposes to begin construction of the proposed lines as soon as the certificate sought is obtained and to complete them with all reasonable dispatch. Our order authorizing the proposed acquisition of control of the Southwestern System by the Southern Pacific will be conditioned upon the construction of the proposed lines within the time fixed in our certificate.

Upon the facts presented we find:

1. That the public convenience and necessity require and will require the construction by the Arizona Eastern Railroad Company of the proposed lines of railroad in Pinal, Maricopa, and Yuma Counties, Ariz. described in the application filed under Finance [fol. 43] Docket No. 4148.

(2) That the acquisition by the Southern Pacific Company of control of the El Paso & Southwestern Railroad Company, the El Paso & Southwestern Railroad Company of Texas, the Burro Mountain Railroad Company, the Arizona & New Mexico Railway Company, the Dawson Railway Company, the El Paso & Northeastern Railway Company, the El Paso & Rock Island Railway Company, the Alamogordo & Sacramento Railway Company, the El Paso & Northeastern Railroad Company, and the Tucson, Phoenix & Tidewater Railroad Company by stock ownership and by lease as aforesaid will be in the public interest.

(3) That the proposed issue of $28,000,000 of common capital stock and $29,400,000 of 5 per cent 20-year collateral-trust bonds by the Southern Pacific Company as aforesaid (a) is for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service; and (b) is reasonably necessary and appropriate for such purpose.

(4) That permission for the Arizona Eastern Railroad Company to retain the excess earnings from the proposed new construction should be denied.

An appropriate order and certificate will be entered.

EASTMAN, Commissioner, dissenting:

Under paragraph (2) of section 5 of the interstate commerce act we may authorize one carrier to acquire control of another in any manner "not involving consolidation of such carriers into a single system for ownership and operation." Under paragraph (6) of the same section we may authorize such consolidations, but only after we have adopted a general consolidation plan under the pro- [fol. 44] visions of paragraph (5). We are here asked to authorize an acquisition of control under paragraph (2). In my opinion, what is proposed is not such an acquisition of control as is contemplated by that paragraph, but is a consolidation of the carriers in question into a single system for ownership and operation. The Southern Pacific is to own 100 per cent of the shares of stock evidencing ownership of the El Paso & Southwestern system. In addition it is to become the lessee of the various parts of that system so that their operations may be intermingled with its own for purposes of management and accounting. Thereafter the two systems will, to all intents and purposes, be fused. It will in no way be easier to pry them apart than if there were a technical consolidation of the corporate entities. If this is not a consolidation of the carriers into a single system for ownership and operation within the meaning of paragraph (2), then the distinction which that paragraph attempts to make is utterly inconsequential. In my opinion, it was not the intent of Congress that we should permit the fusing of railroads in this irretrievable fas-ion prior to the adoption of our consolidation plan, and the action of the majority in this case is contrary to both the spirit and the letter of the law.

Certificate and Order

At a Session of the Interstate Commerce Commission, Division 4, Held at Its Office, in Washington, D. C., on the 30th Day of September, A. D. 1924

Finance Docket, No. 4164

Control of El Paso & Southwestern System and Securities issue by SOUTHERN PACIFIC

Finance Docket, No. 4148

Construction of Extensions and Branch Line by ARIZONA EASTERN RAILROAD COMPANY

[fol. 45] A hearing in these proceedings and investigation of the matters and things involved therein having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof;

It is hereby certified, That the present and future public convenience and necessity require and will require the construction

by the Arizona Eastern Railroad Company of the lines of railroad in Pinal, Maricopa, and Yuma Counties, Ariz., described in the application filed under Finance Docket No. 4148 and in the report aforesaid, said lines to be constructed as extensions of its existing lines: Provided, however, and this certificate is issued upon the express condition, that the construction of said lines shall be commenced on or before January 1, 1925, and completed on or before December 31, 1926, and that the Arizona Eastern Railroad Company shall report to this commission within 15 days thereafter the commencement and completion, respectively, of such construction.

It is ordered, That the Arizona Eastern Railroad Company, or its lessee, when filing schedule establishing rates and fares to and from points on said new lines of railroad, shall in such schedules make specific reference to this certificate by title, date, and docket number.

It is further ordered, That acquisition by the Southern Pacific Company of control of the El Paso & Southwestern Railroad Company, the El Paso & Southwestern Railroad Company of Texas, the Burro Mountain Railroad Company, the Arizona & New Mexico Railway Company, the Dawson Railway Company, the El Paso & Northeastern Railway Company, the El Paso & Rock Island Railway Company, the Alamogordo & Sacramento Mountain Railway Company, the El Paso & Northeastern Railroad Company, and the Tucson, Phœnix & Tidewater Railroad Company by stock ownership through purchase of the interest of the El Paso & Southwestern Company therein and by lease, as set forth in the application [fol. 46] recorded under Finance Docket No. 4164, and in the report aforesaid be, and it is hereby, approved and authorized: Provided, however, and the authorization herein given is upon the express condition, that the Arizona Eastern Railroad Company shall complete the construction of the proposed lines, the construction of which is authorized by the certificate of this commission herein, within the time fixed in said certificate; and provided further, That the Southern Pacific Company shall not sell, pledge or otherwise dispose of the capital stock of said companies, control of which is hereby authorized, or any part thereof, without the consent of this commission.

It is further ordered, That for the purpose of acquiring the interest of the El Paso & Southwestern Company in the companies comprising the El Paso & Southwestern System and in the Nacozari Railroad Company, the Southern Pacific Company be, and it is hereby authorized to issue (1) not exceeding $28,000,000 of its common capital stock consisting of 280,000 shares of the par value of $100, said stock to be represented by certificates substantially in the form submitted with the application; and (2) not exceeding $29,400,000, principal amount, of collateral-trust bonds under and pursuant to, and to be secured by, a trust indenture dated May 1, 1924, made by the Southern Pacific Company to the Hanover National Bank of the City of New York, trustee; said bonds to be dated May 1, 1924, to bear interest at the rate of 5 per cent per annum, payable semiannually, on May 1 and November 1 in each year; to mature

May 1, 1944; to be redeemable on any semiannual interest date at par and accrued interest on 90 days' notice and to be secured by pledge with said trustee of the collateral securities described in said indenture; said stock and bonds to be issued at par and delivered to the El Paso & Southwestern Company in payment for its interest in [fol. 47] and to the securities and properties of the companies aforesaid.

It is further ordered, That, except as herein authorized, said stock and bonds shall not be sold, pledged, re-pledged, or otherwise disposed of by the applicant, the Southern Pacific Company, unless and until so ordered by this commission.

It is further ordered, That the Southern Pacific Company shall report concerning the issue of said stock and bonds in conformity with this commission's order dated July 22, 1924, respecting applications filed under section 20a of the interstate commerce act.

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said stock or dividends thereon or said bonds or interest thereon, on the part of the United States.

It is further ordered, That the request of the Arizona Eastern Railroad Company for permission to retain excess earning be, and it is hereby, denied.

And it is further ordered, That the certificate and order herein shall take effect and be in force from and after 30 days from the date thereof.

By the commission, division 4.

George B. McGinty, Secretary. (Seal.)

[File endorsement omitted.]

[fol. 48] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF JUDGE COLIN NEBLETT DENYING COMPLAINANTS' ORAL MOTION TO CALL TWO OTHER JUDGES TO ASSIST—October 27, 1924

Be it remembered, That on this day was presented to the Court the original bill of complaint in this cause, and came on to be heard on the oral motion of the complainants, through E. C. Wade, Jr., Esquire, their solicitor, that this Court call to its assistance two other judges that the complainants may make an application to said three judges for an injunction suspending and restraining the enforcement, operation and execution of the order of the Interstate Commerce Commission, complained of in the complaint; and the Court, having heard said bill of complaint read and having heard the oral motion hereinabove referred to, together with counsel's argument thereon, and being fully advised in the premises, is of the opinion

that, it appearing from a reading of the complaint that the residence of the defendant The Southern Pacific Company, a corporation, is in the State of Kentucky, and the residence of the defendant The El Paso & Southwestern Railroad Company, a corporation, is in the State of Arizona, and the order sought by complainants to be [fol. 49] suspended, and its operation, execution and enforcement restrained, was granted by the Interstate Commerce Commission on the application of said two defendants, the venue of this suit being in the State of Arizona or in the State of Kentucky the Court is without jurisdiction to grant the application.

It is therefore ordered, adjudged and decreed by the Court that the motion of complainants be and the same is denied; to which ruling of the Court the complainants, through their attorneys, in open court excepted.

(Signed) Colin Neblett, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PLEA TO JURISDICTION OF DEFENDANTS, SOUTHERN PACIFIC COMPANY AND EL PASO & SOUTHWESTERN RAILROAD COMPANY—Filed Nov. 15, 1924

Now come Southern Pacific Company and El Paso & Southwestern Railroad Company, parties defendant herein, and, appearing under protest for the purposes of this, their plea to the jurisdiction and to [fol. 50] the venue only and not appearing generally, represent and show to the Court:

That this Court has not jurisdiction of the alleged cause of action sought to be asserted in complainants' bill and that the venue of the suit upon said alleged cause of action does not lie in the District Court of the United States for the Western District of Texas, but, on the contrary, said venue lies, if this suit is maintainable at all, in the District Court of the United States for the District of Arizona or for the District of Kentucky, as complainants may elect to file their bill in either of said Districts, for the following reasons, to-wit:

Because it affirmatively appears from the face of complainants' Bill heretofore filed herein that Southern Pacific Company, a corporation of the State of Kentucky, having its domicile in said State of Kentucky, and El Paso & Southwestern Railroad Company, a corporation of the State of Arizona, having its domicile in the State of Arizona, were the parties upon whose petition the order of the Interstate Commerce Commission sought to be reviewed and set aside in this proceeding was made and because it further appears from the said bill of complainants that the said order relates to transportation and was made upon the petition of the parties aforesaid.

Premises Considered, defendants pray that this, their plea to the jurisdiction and to the venue be sustained and that the complainants' bill be dismissed.

(Signed) Baker, Botts, Parker & Garwood, J. H. Tallichet, Kemp & Nagle, Solicitors for Defendants Aforesaid.

[File endorsement omitted.]

[fol. 51] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLEA TO JURISDICTION OF DEFENDANTS, THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION—Filed Nov. 17, 1924

Now come The United States of America and the Interstate Commerce Commission, parties defendant herein, and, appearing under protest for the purposes of this, their plea to the jurisdiction and to the venue only and not appearing generally, represent and show to the Court:

That this Court has not jurisdiction of the alleged cause of action sought to be asserted in complainants' bill and that the venue of the suit upon said alleged cause of action does not lie in the District Court of the United States for the Western District of Texas, but, on the contrary, said venue lies, if the suit is maintainable at all, in the District Court of the United States for the District of Arizona or for the District of Kentucky, as complainants may elect to file their bill in either of said Districts, for the following reasons, to-wit:

Because it affirmatively appears from the fact of complainants' bill heretofore filed herein that Southern Pacific Company, a corporation of the State of Kentucky, having its domicile in said State [fol. 52] of Kentucky, and El Paso & Southwestern Railroad Company, a corporation of the State of Arizona, having its domicile in said State of Arizona, were the parties upon whose petition the order of the Interstate Commerce Commission sought to be reviewed and set aside in this proceeding was made and because it further appears from the said bill of complainants that the said order relates to transportation and was made upon the petition of the parties aforesaid.

Premises considered, defendants pray that this, their plea to the jurisdiction and to the venue be sustained and that the complainants' bill be dismissed.

(Signed) P. J. Farrell. P. J. Farrell, Solicitor for Interstate Commerce Commission; Blackburn Esterline. Blackburn Esterline, Assistant to Solicitor General of the United States; H. R. Gamble. H. R. Gamble, Special Assistant to United States Attorney, Solicitors for Defendants aforesaid.

[File endorsement omitted.]

[fol. 53] IN UNITED STATES DISTRICT COURT

OPINION OF COURT ON APPLICATION TO ENJOIN AN ORDER OF THE INTERSTATE COMMERCE COMMISSION—Filed Dec. 16, 1924

Sweeney & Wade, of El Paso, for Complainants;

H. R. Gamble, Special Assistant to the United States Attorney; J. H. Tallichet, of Houston, Texas; Kemp & Nagle, of El Paso, Texas; W. A. Hawkins, of El Paso, Texas, and Del W. Harrington, of El Paso, Texas, for Defendants.

This bill was filed some time in October, 1924. At the time of its filing there was no Judge available in the El Paso Division, Judge Smith being deceased. On October 27th, 1924, it was presented to Judge Neblett, who was sitting by designation. After having considered the bill Judge Neblett entered the following order.

"Be it remembered, That on this day was presented to the Court the original bill of complaint in this cause, and came on to be heard on the oral motion of the complainants, through E. C. Wade, Jr., Esquire, their solicitor, that this Court call to its assistance two other judges that the complainants may make an application to said three judges for an injunction suspending and restraining the enforcement, operation and execution of the order of the Interstate Commerce Commission, complained of in the complaint; and the Court having heard said bill of complaint read and having heard the oral motion hereinabove referred to, together with counsel's argument thereon, and being fully advised in the premises, is of the opinion that, it appearing from a reading of the complaint that the residence of the defendant the Southern Pacific Company, a corporation, is in the State of Kentucky, and the residence of the defendant The El Paso & Southwestern Railroad Company, a corporation, is in the [fol. 54] State of Arizona, and the order sought by complainants to be suspended and its operation, execution and enforcement restrained, was granted by the Interstate Commerce Commission on the application of said two defendants, the venue of this suit being in the State of Arizona or in the State of Kentucky the Court is without jurisdiction to grant the application.

"It is therefore ordered, adjudged and decreed by the Court that the motion of complainants be and the same is denied; to which ruling of the court the complainants, through their attorneys, in open court excepted."

After the entry of the above order all of the defendants filed pleas to the jurisdiction.

Now, forty-eight days after the signing of the above order, the complainants again appear and ask that this Court call to his assistance a Circuit Judge and another District Judge to hear and rule such pleas.

The defendants suggest that they are not asking to have their pleas to the jurisdiction passed upon at this time; that at some more convenient date there may be available three Judges and at that time

action may be taken. The complainants, however, insist that the cause should be speeded to its ultimate conclusion.

The Commerce Court which was originally vested with the jurisdiction to pass upon the judgments of the Interstate Commerce Commission, was abolished on December 31st, 1913, and the jurisdiction was vested in District Courts. The Act provides "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission, shall be issued or granted by any District Court of the United States, or by any Judge thereof, or by any Circuit Judge acting as a District Judge, unless the application for the same shall be presented to a Circuit or District [fol. 55] Judge, and shall be heard and determined by three Judges, of whom at least one shall be a Circuit Judge, and unless a majority of said three Judges shall concur in granting such application. When such application as aforesaid is presented to a Judge, he shall immediately call to his assistance to hear and determine the application two other judges."

The Act also provides that "The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited."

At what point—when—shall the one Judge call in the other two Judges? Is it imperative that he call them for every order and preliminary step that is taken in the shaping of the case prior to the hearing of the injunction feature? May one Judge determine, not upon the merits of the bill, but as to the parties, that there is no jurisdiction? Or must every step be taken before the entire Court as constituted in the statute?

Manifestly any proceeding or judgment or order which involves the merits of the bill; which touches the paramount policy that is and was back of the reason for the statute, must be considered by the assembled Judges that their combined wisdom may adjudge the difficulties.

That sentence of the statute which says that "Upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirements as to Judges and the same procedure as to expedition and appeal shall apply," does not seem to refer to the consideration of preliminary questions.

While the provisions of Section 266 of the Judicial Code are somewhat different to the provisions of the statute under consideration, yet the reason of the legislation is approximately the same. The District Judge must call to his aid two other Federal Judges before there shall be an interlocutory injunction to restrain the enforcement [fol. 56] of a State statute on the ground of its alleged unconstitutionality. Judge Tuttle held in Republic vs. Deland, 275 F. 634, that he had the power to dispose of a motion to dismiss a bill which had been presented to him and which attacked the constitutionality of a State Act. In Brown Drug Company vs. U. S., 235 F. 603, Circuit Judge Smith, sitting with two District Judges, in the consideration of a suit against the Interstate Commerce Commission

and certain carriers to prevent the enforcement of new rates, and where there was an application for a temporary injunction, held that a motion to dismiss could not be heard before the three Judges. That they were convened to hear the application for a temporary writ of injunction and not to determine whether the case should be dismissed upon its merits. "If the motion had been filed before the application had been made, there would be no pretense that these three Judges would sit to hear that question." Continuing, he said: "The motion to dismiss is one the majority of this Court think must be submitted to the District Judge alone and be determined by him. That motion is not entirely free from difficulty. It is alleged in the bill that no legal evidence was taken before the Interstate Commerce Commission which would confer jurisdiction on it in this matter. Some of the judges are inclined to the opinion that it stated a legal conclusion; some that it stated an ultimate fact to be determined by the District Court. Whether he will determine it today or not is no affair of this Court. When we come to the question as to whether the temporary injunction shall be granted or not the majority are agreed it cannot be done." See also Yellow Pine vs. United States, U. S. Supreme Court, December 1st, 1923.

The difficulty of the present situation, however, is that Judge Neblett, to whom the present bill was presented, and who was presiding at that time in this Court and whose decision and order this [fol. 57] Court has no authority or power to review, determined that this Court had no jurisdiction, and so determining declined to call two other Judges. Following such announcement and order all defendants filed the pleas mentioned. The defendants do not now call such pleas up for consideration, but all counsel ask for their consideration by three Judges. Therefore, notwithstanding my own views that it is quite possible that the District Judge may act upon such matters without asking the help of two other Judges, yet the delicacy of the present situation causes me to conform to the desire of counsel, and the case is set for hearing January 10th, 1925, at 11:00 A. M., at New Orleans, on pleas to the jurisdiction before three Judges.

(Signed) Wm. H. Atwell, District Judge.

[File endorsement omitted.]

In Equity Cause No. 146, Home Furniture Company vs. The United States, Interstate Commerce Commission, and Railways, an order will be drawn calling to my aid Honorable R. W. Walker, Presiding Justice of the United States Circuit Court of Appeals for the Fifth Circuit, and Honorable Du Val West, United States District Judge for the Western District of Texas, for a hearing of the above cause at New Orleans, Louisiana, at 11:00 o'clock on Saturday, January 10th, 1925.

(Signed) Wm. H. Atwell, United States District Judge.

[fol. 58] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF JUDGE WM. H. ATWELL CALLING TO ASSISTANCE TWO OTHER JUDGES AND SETTING CAUSE FOR HEARING—Filed Dec. 17, 1924

Be it remembered, That on this day there was presented to the Court the original bill of complaint herein by the Complainant, and the Complainant also called the attention of the Court to certain pleas to the jurisdiction filed by the defendants, the complainant appearing by its attorneys Joseph U. Sweeney, Esq., and Edward C. Wade, Jr., Esq., who moved, orally that the Court proceed to either pass upon said pleas to the jurisdiction so filed by the said defendants or to call to its assistance two other Judges to hear said pleas to the jurisdiction, and to set the case for early hearing; that the attorneys for the defendants did not present their please to the jurisdiction nor join in the request for an early hearing thereof, and, thereupon, the Court determined and found that said cause should have an early hearing and be speeded to adjudication, whereupon all counsel, respresenting all parties complainant and respondents, requested that the question of jurisdiction should be submitted to a court composed of three Judges, as provided by the statute in such case made and provided, and the Court having heard said counsel and being fully advised in said premises doth grant said motion and request in accordance with said agreement.

It is therefore ordered, adjudged and decreed by the Court that said motion and request be, and the same is, hereby, granted, and the Court doth hereby call to his aid Honorable Richard W. Walker, Senior Circuit Judge for the Fifth Circuit, and Honorable Du Val [fol. 59] West, District Judge for the Western District of Texas, and hereby sets the said cause for hearing on said pleas to the jurisdiction, and for such other purposes and procedure as under the law is necessary and required, at New Orleans, Louisiana, at 11:00 o'clock A. M., on Saturday, January 10th, 1925 and the Clerk of this Court shall transmit all papers herein to said place at said time for said hearing and shall forward a certified copy of this order to the said Honorable Richard W. Walker, and to the said Honorable Du Val West.

Done at El Paso, Texas, this the 16th day of December, A. D., 1924.

(Signed) Wm. H. Atwell, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

FINAL DECREE—Filed Jan. 15, 1925

The above numbered and entitled cause came on to be heard on this date before the undersigned, Richard W. Walker, United States Circuit Judge for the Fifth Circuit, Du Val West, United States Dis-[fol. 60] trict Judge for the Western District of Texas, and William H. Atwell, United States District Judge for the Northern District of Texas, the parties to said cause being present by their respective attorneys, and said cause was submitted on the pleas of the defendants therein to the jurisdiction of the court and to the venue only, said pleas praying that the same be sustained and that complainants' bill be dismissed; and thereupon, after due consideration, the court being of opinion that the order of the Interstate Commerce Commission sought to be brought into question by the bill in said cause relates to transportation, it is Ordered, Adjudged and Decreed that the said pleas to the jurisdiction and to the venue be, and the same are hereby, sustained; and it is further ordered, adjudged and decreed that the complainants' bill of complaint be, and the same is, dismissed at complainants' cost. And thereupon, in open Court, the plaintiffs' by their attorney, duly excepted to the judgment and ruling of the Court.

Done at New Orleans, Louisiana, this 10th day of January, 1925.

(Signed) Richard W. Walker, United States Circuit Judge. Du Val West, United States District Judge. Wm. H. Atwell, United States District Judge.

[File endorsement omitted.]

[fol. 61] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Feb. 16, 1925

And now, on this 16th day of February, 1925, came the above named plaintiffs, Home Furniture Company, a co-partnership, and George H. Park and James F. Kilcrease individually and as partners in trade, composing the partnership and doing business under the firm name and style of Home Furniture Company, by Jos. U. Sweeney and Edward C. Wade, Jr., their solicitors, and pray an appeal from the final decree of this Court herein to the Supreme Court of the United States, and say that the said final decree in said cause is erroneous and against the just rights of said plaintiffs, for the following reasons:

First. Because the Court erred in holding that the Order of the Interstate Commerce Commission referred to in said decree related to transportation.

Second. Because the Court erred in sustaining the pleas to the jurisdiction and the venue filed by defendants.

Third. Because the Court erred in holding that it had no jurisdiction to proceed with the cause.

Fourth. Because the Court erred in entering the final judgment herein dismissing complainants' bill of complaint.

Wherefore, the complainants' pray that the said final decree of the United States District Court for the Western District of Texas may be corrected and reversed.

(Signed) Jos. U. Sweeney, Jos. U. Sweeney, Edward C. Wade, Jr., Edward C. Wade, Jr., Solicitors for Plaintiffs.

P. O. Address: El Paso, Texas.

[File endorsement omitted.]

[fol. 62] IN UNITED STATES DISTRICT COURT

PETITION FOR AND ORDER ALLOWING APPEAL—Filed Feb. 25, 1925

The above named plaintiffs, Home Furniture Company, a copartnership, and George H. Park and James F. Kilcrease, individually and as partners in trade, composing the partnership of and doing business under the firm name and style of Home Furniture Company, conceiving themselves aggrieved by the final decree made and entered herein on the 10th day of January, A. D. 1925, dismissing plaintiffs' Bill of Complaint, in the above entitled cause, do hereby appeal from said final decree to the Supreme Court of the United States for the reasons specified in the Assignment of Errors, which is filed herewith, and they pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

(Signed) Jos. U. Sweeney, Edward C. Wade, Jr., Solicitors for Plaintiffs.

Post Office Address: El Paso, Texas.

The above and foregoing application for appeal, coming on to be heard this 18th day of February, A. D. 1925, and the Assignment of Errors of complainants filed in said cause being presented to the Court

with said application for appeal, it is ordered in open court that the said appeal be allowed, as prayed for.

Appeal bond fixed at $300.00.

(Signed) Du Val West, District Judge, Sitting for the Western District of Texas, El Paso Division. Wm. H. Atwell, U. S. District Judge. R. W. Walker, U. S. Circuit Judge.

[File endorsemet omitted.]

[fol. 63] Bond on Appeal for $300—Approved and filed March 4, 1925; omitted in printing

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[fols. 64 & 65] Citation—In usual form showing service on Baker, Botts, et al.; filed March 11, 1925; omitted in printing

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[fol. 66] In United States District Court

Stipulation re Transcript of Record—Filed March 11, 1925

It is hereby stipulated, by and between the above named parties plaintiffs and defendants, acting by and through their respective attorneys of record herein, that the transcript of record in the above styled and numbered cause, for use on appeal to the Supreme Court of the United States, shall include the followings portions of the record, to be incorporated into said transcript and duly authenticated by the Clerk of said Court, that is to say:

Plaintiffs' Bill of Complaint;
Order of Judge Neblett;
Defendants' Pleas to the Jurisdiction;
Opinion of Judge William H. Atwell;
[fol. 67] Order of Judge Atwell setting Pleas to the Jurisdiction for hearing at New Orleans;
Final Decree;
Assignment of Errors;
Petition and Allowance of Appeal;
Cost Bond;
Citation, with admission of Service;
This Stipulation.

(The clerk will omit from the transcript all indorsements except file-marks, all headings, and the map marked exhibit "B").

It is further stipulated and agreed, that the præcipe called for by the first section of Rule Eight and other provisions of law and the Rules of the Supreme Court, indicating the portions of the

record to be incorporated in the transcript of record on appeal, is hereby expressly waived, and this stipulation shall take the place thereof.

At El Paso, Texas, this the 6th day of March, A. D. 1925.

(Signed) Jos. U. Sweeney, Jos. U. Sweeney, Edward C. Wade, Jr., Edward C. Wade, Jr., Attorneys for Complainants. H. R. Gamble, Assistant United States Attorney, for the United States of America and the Interstate Commerce Commission. Baker, Botts, Parker & Garwood, Kemp & Nagle, Attorneys for the Southern Pacific Company. Del. W. Harrington, Attorneys for El Paso and Southwestern Railroad Company.

[File endorsement omitted.]

[fols. 68-71] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

THE UNITED STATES OF AMERICA,
Western District of Texas, ss:

I, D. H. Hart, Clerk of the United States District Court for the Western District of Texas, hereby certify that the foregoing *on* 67 pages is a true and correct transcript of proceedings had and orders entered in cause No. 146 in Equity, entitled Home Furniture Company, et al., vs. The United States of America, et al., as the same appear on file and of record in this office.

I further certify that the foregoing record embraces only such instruments and orders as are specified in the stipulation filed by the appellants and agreed to by the appellees.

Witness my official signature and the seal of said court hereto affixed at office in the City of El Paso, Texas, this 17th day of March, A. D., 1925.

D. H. Hart, Clerk, by J. N. Phillips Deputy Clerk. (Seal of U. S. District Court, Western District of Texas.)

Endorsed on cover: File No. 30970. W. Texas D. C. U. S. Term No. 324. Home Furniture Company, George H. Park, and James F. Kilcrease, etc., appellants, vs. The United States of America, The Interstate Commerce Commission, The Southern Pacific Company, et al. Filed March 21, 1925. File No. 30,970.

(17)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 324

HOME FURNITURE COMPANY, GEORGE H. PARK, AND JAMES F. KILCREASE, ETC., *Appellants.*

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE SOUTHERN PACIFIC COMPANY, ET AL., *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANTS.

JOS. U. SWEENEY,
EDWARD C. WADE, Jr.,
Solicitors for Appellants,
El Paso, Texas.

INDEX

CASES AND AUTHORITIES CITED

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THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE SOUTHERN PACIFIC COMPANY, ET AL., *Appellees.*

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE

Introductory Statement.

This is an appeal from a final decree of the United States District Court for the Western District of Texas, El Paso Division, dated January 10, 1925, in a suit instituted by the Home Furniture Company, a co-partnership, and George H. Park and James F. Kilcrease, individually and as partners in trade, composing the partnership of and doing business under the firm name and style of Home Furniture Company, plaintiffs, against The United States of America, The Interstate Com-

merce Commission, The Southern Pacific Company, a corporation, and El Paso & Southwestern Railroad Company, a corporation, defendants. The purpose of the suit was to set aside an order of The Interstate Commerce Commission authorizing, among other things, the acquisition by The Southern Pacific Company of control of the carriers comprising the El Paso & Southwestern System, by stock ownership through purchase of the interest of the El Paso & Southwestern Company therein and by lease approved and authorized. The suit also had for its purpose the suspension of said order of The Interstate Commerce Commission by means of an injunction, pending the litigation.

The lower Court held, it appearing upon the face of the Complaint that the residence of the defendant The Southern Pacific Company, a corporation, is in the State of Kentucky, and the residence of the defendant the El Paso & Southwestern Railroad Company, a corporation, is in the State of Arizona, and the order sought to be suspended and its operation, execution and enforcement restrained, was granted by The Interstate Commerce Commission on the application of said two defendant railroad companies, that the venue of said suit was in the State of Arizona or in the State of Kentucky and that the United States District Court for the Western District of Texas was without jurisdiction of the suit.

Final decree was entered on January 10, 1925, dismissing complainants' bill of complaint, and from this decree complainants appeal.

The case involves a construction of the Act of Congress of October 22, 1913, chapter 32, 38 Stat. L. 219; Volume 5 Federal Statutes Annotated, pages 1108 (Second Edition), fixing venue in this class of cases.

The complainants contend that this suit was properly instituted in the District Court for the Western District of Texas under the terms of the said Section and that the lower court was in error in dismissing complainants' bill of complaint and in holding that the venue of the suit was in the State of Kentucky or in the State of Arizona. The errors assigned are for the purpose of raising these questions.

Bill of Complaint.

The bill of complaint was filed in the lower court on October 23, 1924, and is set forth in extenso on pages 1 to 32 of the Record.

The bill among other things alleges:

That the plaintiffs are resident-citizens and tax-payers of the City of El Paso, County of El Paso and State of Texas and reside within the Western District of Texas, El Paso Division;

That the defendant The Southern Pacific Company is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and is authorized to and does operate railroads in the States of Oregon, California, Nevada, Utah, Arizona and New Mexico, and a line of steamships between the cities of Galveston, Texas, and New Or-

leans, Louisiana, and the City of New York, and is authorized to operate railroads in any other state of the United States, and is a carrier by railroad engaged in the transportation of passengers and property subject to The Interstate Commerce Act; that the defendant El Paso & Southwestern Railroad Company is a corporation incorporated under the laws of the State of Arizona and is authorized to and does operate railroads in the States of Ariozna, New Mexico and Texas and said defendant is engaged in the transportation of passengers and property in interstate commerce, subject to the Interstate Commerce Act; that defendant El Paso & Southwestern Railroad Company is part of what is known as the El Paso & Southwestern Railway System, consisting of a number of railroad companies, all referred to for convenience sake as the Southwestern System;

That the plaintiffs are and have been for several years last past engaged in the furniture business with their principal place of business at El Paso, Texas, and in connection with and as a part of said business buy and sell new and second-hand furniture in different parts of the United States, including New Mexico and Arizona; that plaintiffs in connection with said business for several years last past have been and are now purchasing furniture from business houses in Chicago, Illinois, and other cities in the eastern portion of the United States, and have caused said furniture to be shipped from said cities over the lines of the Chicago, Rock Island and Pacific Railroad, and the lines of the El Paso & South-

western Railroad to El Paso, Texas, for delivery to plaintiffs; that plaintiffs for several years last passed have sold large quantities of furniture, both new and secondhand, and have shipped the same to customers in New Mexico, Arizona and West Texas, and in doing so have used the lines of the Southern Pacific and the El Paso & Southwestern Railway System; and that plaintiffs are now engaged in the business of shipping furniture to Arizona, New Mexico and West Texas and in using the lines of said railway systems for that purpose, are engaged in shipping goods, wares and merchandise in interstate commerce.

The bill further sets forth the proceedings before The Interstate Commerce Commission with reference to the application filed before that Body by The Southern Pacific Company and the El Paso & Southwestern Railroad Company under paragraph 2 of Section 5 of the Transportation Act of 1920 for an order approving and authorizing acquisition by The Southern Pacific Company of control of the El Paso & Southwestern System by stock ownership through purchase of the interest therein of the El Paso & Southwestern Company, and alleges that said application culminated in an order and report of a Division of the Interstate Commerce Commission, composed of three commissioners, two of said Commissioners in effect approving said application and the third Commissioner dissenting from the report of the majority and finding in substance and effect that the authorization granted by the other two Commissioners was in violation of the letter

and the spirit of the law and in excess of the authority of the Commission.

The bill further sets forth that as a result of said report and decision, an order of the said Division was made, dated the 30th day of September, A. D. 1924, in effect authorizing among other things the acquisition of control by the Southern Pacific Company of the Southwestern System. As exhibits to the bill of complaint are attached: (1) The agreement between the railroad companies under which the proposed acquisition of control is sought to be authorized. (See Exhibit "A" page 16 et seq. of Record); (2) The order of the Interstate Commerce Commission authorizing the acquisition by The Southern Pacific Company of control of the carriers comprising the El Paso & Southwestern System, by stock ownership, (Exhibit "C" pages 23 et seq., of Record); (3) Report of Division 4 authorizing application, (Exhibit "C" pages 24 et seq., of Record); and (4) Dissenting opinion of Commissioner Eastman. (Exhibit "C", page 30 of record).

The bill attacks the findings, order and certificate of The Interstate Commerce Commission and alleges that The Interstate Commerce Commission exceeded its power and authority delegated to it by the Interstate Commerce Act and the Transportation Act of 1920 and erred in matters of law as specifically set forth in paragraph 13 of the said Bill. (Page 8 of Record).

The bill further alleges the invalidity of the findings, order and certificate of The Interstate Commerce Commis-

sion on divers other grounds, among others, in substance, being:

(1) Invalidity of a portion of the Transportation Act of 1920 because in conflict with Sections 5 and 6 of Article 10 of the Constitution of the State of Texas.

(2) Invalidity of a portion of the Transportation Act of 1920 because in conflict with Section 201 of the Constitution of the State of Kentucky of 1891;

(3) That the Commission by its order exceeded its power and authority in endeavoring to permit an acquisition, consolidation and merger in violation of both the spirit and letter of the Transportation Act of 1920, in that said Act provides that competition shall be preserved as fully as possible and said order supresses and stifles competition between the two systems in the manner set forth;

(4) That said order permits the consolidation of two systems of railroad under the terms of the Transportation Act of 1920 in advance of the complete plan of consolidation called for by said Act, which plan has not yet been promulgated by the Commission, and said authorization is premature and in excess of the power conferred upon it by Congress;

(5) That said order permits the fusing of two systems of railroad under the terms of paragraph 2 of Article 5 of the Transportation Act of 1920, which paragraph confers no power on the Commission to permit an acquisition by one car-

rier of the control of another carrier, either under a lease or by the purchase of stock in a manner involving the consolidation of such carriers into a single system for ownership and operation;

(6) That said order permits the fusing of two systems of railroad as a "piece-meal" consolidation, on the assumption that it is in conformity and harmony with a "tenative plan" of the Commission, whereas the final plan contemplated by the Transportation Act has not yet been adopted by the Commission;

(7) That said order permits the fusing of two railroads systems in violation of the plain intent and purpose of paragraph 2 of Section 5 of the Transportation Act of 1920;

(8) That said order permits the fusing of two systems of railroad in competition wit heach other in violation of the terms of the so-called Clayton Anti-Trust Act, and particularly in violation of Section 7 thereof;

(9) That said order is null and void because not in the public interest.

Complainants by their bill pray that said order may be held to be illegal and void and may be enjoined, set aside and suspended; that a restraining order and a preliminary injunction be granted restraining the enforcement of said order during the pendency of the case; and that upon final hearing a final injunction be granted permanently enjoining the enforcement of the said order.

Presentation of Bill of Complaint to Court.

On October 27, 1924, the bill was presented to the lower court, then presided over by Judge Colin Neblett, and oral motion made by the complainants that the court call to its assistance two other judges in order that the complainants might present their application to said three judges for an injunction suspending and restraining the enforcement, operation and execution of the order of The Interstate Commerce Commission aforesaid. (See page 32 of Record.) The Court after having heard the bill of complaint read and the arguments of counsel on the oral motion aforesaid, denied said motion on the ground that it appeared from the complaint that the residence of the defendant, The Southern Pacific Company, is in the State of Kentucky and the residence of the defendant the El Paso & Southwestern Railroad Company is in the State of Arizona, and the order sought by complainants to be sustained was granted by The Interstate Commerce Commission on the application of said two defendants, the court holding that it was without jurisdiction to grant the application.

Pleas to the Jurisdiction.

On November 15, 1924, the Defendants, The Southern Pacific Company and El Paso & Southwestern Railroad Company, filed their plea to the jurisdiction. (See page 33 of Record). On November 17, 1924, the United States of America and The Interstate Commerce Commission likewise filed a plea to the jurisdiction. (See page 34 of record). Both pleas

asserted that the venue of the suit is not in the District Court of the United States for the Western District of Texas, but is in the District Court of the United States for the District of Arizona or in the District of Kentucky, and prayed that complainants' Bill be dismissed.

Order of Judge Atwell Setting for Hearing the Pleas to the Jurisdiction.

On December 16, 1924, the complainants appeared before the said District Court of the United States for the Western District of Texas, then presided over by Judge Wm. H. Atwell, and asked the Court to call to his assistance two other judges to hear and rule upon the pleas to the jurisdiction. (See page 35 of Record). After hearing arguments of counsel, Judge Atwell set the case for hearing on January 10, 1925, at 11 o'clock A. M. at New Orleans, Louisiana, on the pleas to the jurisdiction, before himself and Hon. Richard W. Walker, Senior Circuit Judge of the 5th Circuit, and Hon. Du Val West, District Judge for the Western District of Texas. (See opinion and order, pages 35 et seq., of Record).

Final Decree.

The cause came on to be heard on the pleas to the jurisdiction on the 10th day of January, 1925, before the three judges mentioned in the last paragraph above, and the Court having heard the arguments of counsel sustained said pleas and dismissed complainants' bill of complaint and entered its Final Decree to that effect. (See page 39 of record).

Appeal.

On February 25, 1925, petition was made for an appeal from said Final Decree and an order entered allowing said appeal. (See page 40 of Record). Bond on appeal was given and citation issued. Stipulation was filed specifying the portions of record to be printed.

ASSIGNMENTS OF ERROR.

The assignments of error filed on February 16, 1925, (See page 39 of Record) upon which it is sought to have the final decree of January 15, 1925, reversed, set forth the following grounds of error:

I.

Because the court erred in holding that the order of The Interstate Commerce Commission referred to in said decree related to transportation.

II.

Because the court erred in sustaining the pleas to the jurisdiction and the venue filed by the defendants.

III.

Because the Court erred in holding that it had no jurisdiction to proceed with the cause.

IV.

Because the court erred in entering the final judgment herein dismissing complainants' Bill of Complaint.

ARGUMENT

The Venue of This Suit Lies in the Western District of Texas.

The four Assignments of Error complain of the action of the lower court in holding that it had no jurisdiction of the cause, and in dismissing the bill on that ground. The assignments will, therefore, be treated together and as presenting the same question.

This suit, having for its principal purpose the suspension and setting aside of an order of The Interstatae Commerce Commission, was brought by complainants in the District Court for the Western District of Texas, El Paso Division, under the following Section of the Federal Statutes:

"The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of The Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office.

In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment."

The section in question is taken from the Act of October 22, 1913, page 32, 38 Stat. L. 219, Volume 5 Federal Statutes Annotated p. 1108, Second Edition).

It is clear from the record that the plaintiffs in the Court below reside within the Western District of Texas and have their principal office and place of business in the City of El Paso, County of El Paso and State of Texas and within the Western District of Texas.

It is likewise clear that The Southern Pacific Company is a corporation organized and existing under and by virtue of the laws of the State of Kentucky and operated lines of railroad in a number of the States; also that the defendant railroad company, El Paso & Southwestern Railroad Company, is a corporation, incorporated under the laws of the State of Arizona and operates railroads in the States of Arizona, New Mexico and Texas.

The appellants assert that under the paragraph quoted above, the venue of this suit lies at the place of their residence, to-wit, within the Western District of Texas, for the following reasons: first, the order of the Interstate Commerce Commission does not relate to transportation; second, if there was a matter complained of before The Interstate Commerce Commission, that matter arose in the said District; third, if there was no matter complained of before the Commission, the mat-

ter covered by the order was deemed to arise in said district, because the petitioners in this suit have their principal place of business at El Paso, within said District. These propositions will be discussed in their order.

FIRST: The Order of The Interstate Commerce Commission Does Not Relate to "Transportation."

A close analysis of the statute will demonstrate, we respectfully submit, that the statute in question falls into three parts in fixing the venue in the class of cases involved here. These parts, for convenience sake, might be designated as the first part, the first exception and the second exception. It is clear that a case is taken out from under the first part of the statute if the order does not relate to "transportation." In other words, all orders not relating to transportation are taken from under the first part of the paragraph and the venue is fixed by either the first or second exception.

The paragraph divided into its three parts is as follows:

First Part: The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party, or any of the parties, upon whose petition the order was made.

First Exception: Except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the District where the matter complained of in the petition before the Commission arises.

Second Exception: And except that where the order does not relate either to transportation or to a matter so complained of before the Commission, the matter covered by the order shall be deemed to arise in the District where one of the petitioners in Court has either its principal office or its principal operating office.

In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

Without question Congress, in enacting this elaborate and somewhat complicated provision, endeavored to fix the venue for all kinds of cases brought to enforce, set aside or suspend orders of the Interstate Commerce Commission, so that no case of this nature would fail for want of a venue. It is equally plain that the principal pivotal point upon which the statute turns is the word "transportation," and *that only orders relating to "transportation" fall under the first part of the statute.* All non-transportation orders fall under the exceptions.

In fixing the venue in this case, therefore, our first inquiry is as to whether the order does or does not relate to transportation. The Government, in its plea to the Jurisdiction, asserts that the order in question relates to transportaion, and the venue is in Arizona or Kentucky. We contend that the order does not relate to transportation and the venue is in the Western District of Texas. The issue, then, appears to

involve the meaning of the word "transportation" as used in the paragraph under consideration.

It is an elementary rule applicable here that in the interpretation of statutes words in common use are to be construed in their natural, plain and ordinary signification, and it is equally well settled that so long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy, and it is the plain duty of the Court to give it force and effect.

Lake County v. Rollins, 130 U. S. 662; 9 S. Ct. 651; 32 L. Ed. 1060.

36 Cyc., 1114 and many authorities there cited.

25 R. C. L., p. 988, and many authorities there cited.

Words of a statute are to be taken in their ordinary sense.

Danciger v. Cooley, 248 U. S. 319; 39 Sup. Ct. Rep. 119; 63 L. Ed. 266.

Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and will the meaning commonly attributable to them.

De Graney v. Lederer, 250, U. S. 376; 39 Sup. Ct. Rep. 524; 63 L. Ed. 1042.

An act of Congress must be read according to the natural and obvious import of the language used, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation.

Moore v. United States, 249 U. S. 487; 39 Sup. Ct. Rep. 322; 63 L. Ed. 721.

In pursuance of these well known rules of statutory construction, we submit there should be no dispute as to the ordinary, natural and plain meaning of the word "transportation."

The Standard Dictionary gives us this meaning: "Transportation" is said to be the act of transporting or the state of being transported; conveyance; the carriage of persons or commodities from one place to another.

"Transportation" implies the taking up of persons or property at some point and putting them down at another.

Gloucester Ferry Co. v. Pennsylvania Co., 114 U. S. 196, 203; 5 S. Ct. 826; 29 L Ed. 158.

"Transportation" means carriage from one place to another.

38 Cyc. 947 and authorities there cited.

U. S. v. Hamburg American Line, 159 F. 104, 105; 86 C. C. A. 294.

The word "transportation" is derived from the latin *trans*, over, beyond, *porto*, to carry; to carry over or beyond.

Bouvier's Law Dictionary, Rawle's Edition.

In short, the definitions given above show that the word "transportation" means, in the ordinary acceptation of the term, the act of shipment, of carriage, the taking up of persons or property at some point and putting them down at another.

The view that Congress had in contemplation the ordinary meaning attributable to the word transportation is strengthened by the last sentence in the paragraph under inspection:

"In case such transportation relates to a *through* shipment the term "destination" shall be construed as meaning final destination of such shipment."

By such sentence Congress says as clearly as it was possible to do so that if the *act of carriage* relates to a *through shipment* (a through carriage of goods) the word "destination" shall be construed as meaning final destination of such goods. In other words, Congress in enacting the statute was dealing with the *act of carriage—the shipment* of goods, and in connection with such a shipment endeavored to define the word "destination."

If we go back to the history of the paragraph in question, a flood of light is thrown upon the language, and in our opinion, if there is any doubt as to the meaning of the word "transportation" at this stage of our argument, it is entirely dispelled by the discoveries there.

Prior to the creation of the Commerce Court suits of the nature involved here were brought in the Circuit Courts of the United States.

4 Fed. Stats. Ann. p. 492.

Peoria and Pekin Union Railway Company versus United States, February 1, 1924, advance opinions, 68 L. Ed. 427, note.

By the Act of June 18, 1910, Chap. 309, 36 Stat. L. 539, 5 Fed. Stats. Anno., 2d Ed. p. 1108, the Commerce Court was created and suits to enforce, suspend and set aside orders of the Interstate Commerce Commission were thereafterwards brought in that court, and in that court alone.

A study of the history of the Commerce Court readily shows that such court was created as the outgrowth of a demand on the part of shippers for relief from ills then existing, and was a piece of legislation in the "interest of the public and especially in the interest of the shippers who were seeking to prevent injustice by the railroads." See President Taft's Message vetoing the Act abolishing the Commerce Court, 48th Vol. Congressional Record, p. 11027, 62nd Congress, 2nd Session.

Congress failed to pass the Act abolishing the Court over the Presidential veto during the 62d Congress. When the 63d Congress met, however, there was a unanimity of opinion in Congress that the Commerce Court should be abolished. A number of bills and resolutions were immediately introduced to this end. One of these bills, which embodied word for word, that portion of the Act seeking to abolish the Commerce Court, which had been vetoed by President Taft, was introduced by Mr. Sims. This bill, at the request of the Chairman of the Committee in charge thereof, was then sent to the Attorney General, Honorable John C. McReynolds, now of the Supreme Court, for an opinion and suggestion. The Attorney General on May 6, 1913, sent a written opinion to Mr. Sims

who incorporated it in the Congressional Record, and appears at page 2264 of the Record of the 63d Congress. This letter reads in part:

> "My dear Mr. Sims: As you requested I have considered your bill (H. R. 1921) abolishing the Commerce Court, with a view to giving you some aid about the jurisdiction of the courts. Irrespective of the policy of the measure, upon which I express no opinion, I venture to suggest, in line with your views—
>
> "1. Venue. As drawn, the bill would probably permit the railroads a choice of a considerable number of districts, and I should think it would be desirable to fix the jurisdiction more definitely by law.
>
> "I do not think of any better method than of returning to the method which existed prior to the establishment of the Commerce Court, *which was generally the district in which the complainant resided, or if a corporation, had its principal operating office.* (Italics ours.)

The Chairman of the Committee, Honorable W. C. Adamson, had at this time introduced a resolution having for its purpose the abolishment of the Court. (See p. 2267 of the Congressional Record, 63d Congress, Vol. 50, Part 3).

In this resolution the venue provision for suits thereafter to be brought was as follows:

> "The venue of any suit hereafter brought to enforce, suspend or set aside in whole or in part, any order of the Interstate Commerce Commission shall be in the District where some or all of the transportation covered by the order has either its origin or destination except where the order does not relate to transportation, the venue shall be in the District where the matter complained of in the petition before the Commission arises, except that where the order does not relate either to transportation or to a matter so complained of before the Commis-

sion, the matter covered by the order shall be deemed to arise in the District where one of the petitioners in Court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment."

This resolution was finally attached as a rider to the Urgent Deficiency, Appropriation Bill. See p. 4527, Vol. 50, Part 5, 63d Congress, 1st Session for the Bill. This bill was considered in the Whole House and passed the House on Sept. 9, 1913, the resolution quoted being unchanged. See p. 4620, Vol. 50, Part 5, Congressional Record, 63d Congress.

The House provision in the Deficiency Bill was read in the Senate shortly thereafter. See Vol. 50, Part 5, Congressional Record p. 5407.

On October 3, 1913, Mr. Walsh of Montana pointed out that under the Bill as it came from the House, whenever the carrier was the party appealing to the Courts, it would have the right under the bill to have a review of any adverse order in any District in which the shipment originates or in which it has its termination. (See p. 5413, Congressional Record, Vol. 50, Part 6).

Senator Walsh stated, to illustrate his remarks:

"A petition is filed concerning shipments made from the State of Washington to the State of Minnesota, and the decision is in favor of the petitioners, who reside in the State of Washington. The origin of the transportation is in the State of Washington; the destination is in the State of Minnesota. The decision is in favor of the shipper. The railroad company appeals to the Court from the order of the Commission. The railroad company is

entitled to take its choice of instituting its suit either in the State of Minnesota, or in the State of Washington. If, perchance, the State of Idaho, the State of Montana, or the State of North Dakota, should choose to join with the State of Washington and ask for a *reformation of the rates as they affect all shipments* going into all these States, and the decision accords them the relief which they ask, the railroad company is entitled to take its choice of any one of the District Courts of these States.

"We can not fail to recognize that the railroad companies have their choice among judges, and they would not be actuated by the motives that ordinarily influence the action of men if they did not select the judges whom they thought most favorable to their contention."

On the same legislative day, to-wit: October 3, 1913, at page 5425 of the Congressional Record, appears this:

"Mr. Walsh. Mr. President, before this matter is disposed of I wish to recur for a moment to the subject of venue, to which I referred in my remarks sometime ago.

"I have prepared an amendment which I think will cover the requirements of the case. I do not desire to press it unless the Senate feels that it is desirable to perfect the bill. I feel that to give the carrier an opportunity to make choice of the venue is a privilege which it ought not to be given.

"Mr. Overman. I hope the Senator will introduce his amendment, and I will let it go into conference, and be considered in conference. I will accept it.

"Mr. Walsh. I move then, to strike out all of line 16, page 34, after the word "district," and also all of line 17, to and including the word "destination" and to insert in lieu thereof the following:

"Wherein is the residence of the party or any of the parties upon whose petition the order was made."

"Mr. Overman. I accept that amendment.

"Mr. Walsh. In line 18, after the word "transportation," I move to insert the following:

"or is not made upon the petition of any party."

"Mr. Overman. I accept that.

"Mr. Walsh. Then it will be necessary in order to perfect it, to strike out the sentence commencing on the last line on page 34 and going to and including line 3 on page 35.

"Mr. Overman. I accept that, Mr. President."

There is some suggestion that the amendments offered by Mr. Walsh were recommended by the Attorney General. See p. 1 of Memorandum hereto attached.

The bill was sent to conference and the Senate amendments proposed by Mr. Walsh was agreed to, and the venue pargaraph as we now have it was concurred in. See p. 5516, Congressional Record, Vol. 50, Part 6, 63d Congress.

After the report of the conferees was submitted to both Houses the colloquy took place with reference to the venue statute, in the Senate, which is fully set forth in the memorandum hereto attached. This colloquy appears at pages 5616 et seq. of the Congressional Record, Vol. 50, Part 6, 63d Congress. From the statements of Senators, taken in conjunction with the history above recited, we gather a very definite idea of the intention of Congress, and the evils which the legislation was intended to remedy, although the language used in the venue

provision is somewhat involved and the entire paragraph is loosely worded.

We now see that the word "transportation" as used in the final draft of the venue paragraph was used in the same sense as it was used when placed in the first bill in the House, which provided that the venue should be in the District where some or all of the *transportation* covered by the order had either its origin or destination. "Transportation" as used by the House meant the shipment of goods, and its definition of the word "destination" at the end of the paragraph was for the purpose of obviating the argument that intermediate destinations also fixed venue. The venue was to be in the district of the origin of the shipment and the *final* destination of the shipment. The Senate in amending the House Bill continued the use of the word "transportation" as it had been used by the House, and finally passed the bill with the definition of the word "destination" in it.

The history of the bill, as set out above, also demonstrates in our opinion, that Congress was desirous of taking from the carrier the privilege of selecting its venue, and of placing the venue *at the place of residence of the shipper.* This is made clear by the remarks of Mr. Walsh in connection with his amendments. The bill, as originally drawn, gave an option, in many cases, to the carrier to select a forum which it thought favorable to it. This defect was sought to be changed by the Walsh amendments, so that in the ordinary case arising upon

the complaint of a shipper the suit would have to be brought at the home of the shipper.

The reason for laying the venue at the home of the shipper is obvious, and the same as that expressed by the Circuit Court of Appeals, Fifth Circuit, in the case of the St. Louis Southwestern Ry. Co. v. S. Samuels & Co., 211 F. 588, an action wherein the shipper sued the railroad to enforce a reparation order. The Court in that case there said:

> "Clearly the Legislature did not intend to cover this legislation upon a particular subject by the enactment of the general law. The real reason which doubtless actuated Congress to confer jurisdiction upon the Circuit Court of the District in which the complainants reside, was to provide a means for a shipper to enforce the reparation order for a small amount, as in this case, without having to go 1,000 miles and incur an expense in excess of the amount of the award.
>
> "The legislative body must have known that, in the great majority of cases, orders of reparation would not be for large sums, and that in each instance shippers would start in with a handicap in that the transportation company with its regularly retained corps of attorneys, its free transportation facilities for them, and its witnesses, together with its vast wealth and power, would be able, by declining to pay an order of the Commission, practically to defeat such order, unless the shipper could be brought near enough to a forum where he could enforce such order without being compelled to expend more than the reparation allowed."
>
> "The intention of Congress in regard to venue in cases of this kind is shown by the following from the late act of Congress abolishing the Commerce Court, and transferring jurisdiction to the District Court approved October 22, 1913:

"The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment."

The history of the legislation here under inspection demonstrates that Congress at the inception of the legislation intended to put the venue either at the beginning or the destination of the shipment. It was contemplated that the shipper would complain, in transportation cases, to the Commission and as a result an order against the carrier would go against the carrier, which would seek a review by appealing to the courts. As stated, the carrier was at first given the privilege of selecting its venue. Throught the action of Mr. Walsh in the Senate the House Bill was amended to reverse the venue so that such a suit would lie, not where the carrier might put it as it desired, but at the residence of the shipper who made the complaint in the first instance. In all other cases the venue was where the matter bofore the Commission arose, or where the petitioners in court had their principal place of business.

Congress in passing the venue paragraph in its final form was solicitous for the interests of the shipper and not the railroad, with its vast wealth and power, its free transportation, its staff of regularly retained attorneys, and in approaching the construction of the statute in question we must bear in mind that it is shot through and through with this purpose.

In this case the railroads are insisting that the complaining shippers must go to the domicile of the two corporations, who have been made parties hereto, to maintain their suit. This, we respectfully contend, is contrary to both the letter and the spirit of the paragraph aforesaid.

In this connection, we should bear in mind that the railroad corporations in questions are not necessary parties to this suit. Section 208 of the Judicial Code, 5 Fed. Stats. Ann. (2d Ed.) p. 1110 provides that suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought against the United States and Section 212 of the Judicial Code (5 Fed. Stats. Ann. 2d Ed. p. 1115) provides that communities, associations, corporations, firms and individuals who are interested in the controversy may intervene. The railroad corporations were proper parties and might have intervened after the commencement of the suit, but the principal and only necessary party is the Government. If the complainants had not seen fit to make the railroad corporations parties defendant, could it have been successfully contended that complainants could only sue the Government at the home of the railroads who were not parties to the suit? Be-

cause they were made parties in the first instance should not change the answer to this question.

Now we come to consider whether the present order of the Interstate Commerce Commission relates to "transportation" within the meaning ascribed to that word by Congress if we are correct in our view that "transportation" refers to shipment of goods, then it can be definitely said that the order permitting one carrier to acquire the stock and control of another carrier can not by any stretch of the imagination relate to the shipment of goods.

The paragraph of the section of the Transportation Act of 1920 under which the order complained of herein reads as follows:

> "2. Whenever the Commission is of the opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property, subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any such carrier or carriers, either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquistion, under such rules and regulations and for such consideration, and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

The order of the Interstate Commerce Commission purports to be an order authorizing one carrier to acquire the control of another carrier, and can not be said to refer to, or

to relate to, transportation. Transportation may be indirectly affected but the order primarily is one permitting the merger of two railroad corporations, and relates to the acquisition by one carrier of the control of another carrier, the fusing of one corporation with another—a meaning not comprehended in the word "transportation" as used by Congress. The order covers the transfer of ownership, the issuance of stock and bonds, the acquirement of leases, the transfer of securities and collateral and the like, which matters come under the general definition of *financial transactions* and are apart from matters directly relating to transportation—the shipment of or carriage of goods. The distinction here drawn was made by the Interstate Commerce Commission itself, when, instead of passing the application to the section of the Commission generally handling complaints involving transportation, it assigned the matter to the *Financial Docket,* and the order was issued from the Finance Docket under number 4164. This is similar to a contemporary construction by the Commission itself, which construction is entitled to weight.

If we are correct in our construction of the meaning of the word "transportation" as used by Congress in the paragraph in question, then it is clear that the venue of this suit could not fall under the first part of the paragraph, as that part, as heretofore shown, covers *only transportation orders, and all non-transportation orders fall under one of the exceptions.*

This brings us to a consideration of the exceptions.

SECOND. If there was a matter complained of before the Commission, that matter arose in the Western District of Texas, among others.

The first exception to the venue paragraph is, to say the least, inartistically drawn, but from tne statements of the author of the Senate amendments (Mr. Walsh) as disclosed by the memorandum hereto attached, it is clear that the exceptions were added to fix a venue for cases arising on non-transportation orders, and cases arising on orders initiated by the Commission on its own motion (see p ..... of the memorandum). The first part of the paragraph is intended to cover orders growing out of *complaints* made to the Interstate Commerce Commission by a party. The first exception provision, would apear to be intended to cover *complaints* made against some one by the Commission on its own motion. It is true that the word "petition" is used, but in connection with it is the phrase "complained of in the petition," perhaps showing that Congress was dealing with "complaints" rather than applications or petitions. If the application of the railroad defendants before the Interstate Commerce Commission for an order authorizing the Southern Pacific System to acquire the control of the Southwestern System is to beld a "complaint" then the venue lies where the matter before the Commission arose. As the matter arose in every district where the railroads affected by the order run, it is our opinion that the suit could have been maintained in any one of those districts, including the Western District of Texas, unless the second exception

is deemed to declare, for the purpose of construction, what is meant by the place where the matter arose, in which event, the venue would arise at the home of the plaintiffs—the Western District of Texas.

THIRD. If there was no matter complained of before the Commission, the matter covered by the order is deemed to arise in this district—the residence of the Plaintiff in Court.

If the application of the railroads to the Interstate Commerce Commission for permission to merge, is not a complaint, or a petition complaining of a matter, then the venue of this case falls under the second exception, as an order not relating either to transportation or to a matter complained of before the Commission, in which event the venue is at the residence of the plaintiffs in Court—the Western District of Texas.

It makes little difference in construing the meaning of the two exceptions whether the two exceptions cover the same class of cases, or whether the second exception is intended to cover a class of cases, such as this, which may not have arisen upon complaint. In either event, the result is the same and the venue is in this District. In other words, once it is established that the order herein does not relate to transportation, the venue is taken out from under the first part of the statute and falls under one of the exceptions. If the second exception is merely explanatory of the first exception and was written for the purpose of definitely fixing the *locus* where the matter is deemed to arise, the venue is of necessity here. On the other hand, if the second exception fixes a third class of cases, to-wit:

cases not relating to transportation and not arising upon complaint before the Commission, then the venue is still in the Western District of Texas.

We are not unmindful of the case of Skinner & Eddy Corporation v. United States of America, et al, 63 L. Ed. 772, but it is to be distinguished from the case at bar in our opinion on the ground that that suit was based upon an order growing out of an application for relief from the long-and-short-haul clause in respect to certain west-bound transcontinental rates, a matter directly relating to transportation and involving the shipment of goods and therefore within the first part of paragraph.

SUMMARY

So, in conclusion, we respectfully submit that the pleas to the jurisdiction should have been overruled and the cause permitted to proceed in the manner provided by law. We say, first, that the order of the Commission does not relate to "transportation" within the meaning of the words as used in the statute; second, that, as a consequence, the venue is found under one of the exceptions; that, as a matter not relating to transportation, the venue under any construction to be placed upon the exceptions, arises in the Western District of Texas.

WHEREFORE, premises considered, appellants pray that this cause may be reversed.

Respectfully submitted,

JOS. U. SWEENEY,

EDWARD C. WADE, Jr.,

Postoffice address: El Paso, Texas.

Solicitors for Appellants.

MEMORANDUM

Mr. Overman. I move that the Senate concur in the amendment of the House to the amendment of the Senate Numbered 107.

Mr. Sutherland. Before that motion is put I should like to ask the Senator from North Carolina what was done with amendments 62 and 63, on page 37 of the Senate print?

Mr. Overman. The House receded and those amendments have been concurred in in the report.

Mr. Sutherland. I should like to say to the Senator from North Carolina that as I read the amendment a good deal of confusion is likely to result, particularly from amendment No. 63. The provision as it came from the House was that "the venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district"—

Mr. Overman. I can not understand what theSenator is reading from. Is he reading from page 3763 of the Record?

Mr. Sutherland. I am reading from the Senate print of the bill, page 37.

Mr. Overman. The Senaator is reading beginning in line 13?

Mr. Sutherland. Beginning in line 13.

Mr. Overman. If the Senator pleases, these amendments, I think, were recommended by the Attorney General, and we put them on in the Senate and the House agreed to them.

Mr. Sutherland. I am not preparted to discuss the question as to whether the House provision was wise or whether it should not have been amended as evidently it was intended to be amended, but I think that amendment No. 63 is quite likely to introduce an element of confusion into the matter. Let me finish the reading of the provision from the house, continuing at the point where I was interrupted:

> "Where some or all of the transportation covered by the order, has either its origin or destination, except that where the order does not relate to transportation, the venue shall be in the district where the matter complained of in the petition before the Commission arises."

That is understandable, at any rate, and it is enforcible at any rate. But the Senate introduced, after the word "transportation," the words "or is not made upon the petition of any party," so that in all cases where the order is not made upon the petition of any party the exception which was introduced by the House, "except that where the order does not relate to transportation," does no apply. In other words, where the order is not made upon the petition of any party but relates to transportation, the venue shall be in the district where the matter complained of in the petition before the Commission arises.

Now, a matter relating to transportation may arise in more than one district. For example, articles being transported from Omaha to San Francisco are in transportation judicial districts, and that particular matter will not arise in any particular district but will arise in several districts; and

when you have that kind of a case you have one that will not come with the provision of your law. I don't know whether I make the matter clear or not.

Mr. Overman. I think the Senator is clear about that, and I think probably there ought to be an amendment ,but it is now too late to do anything, because we have agreed to the conference report. That is settled, as far as this bill is concerned.

Mr. Clapp. But we can reconsider the vote.

Mr. Walsh. Mr. President—

The Vice President. Does the Senator from Utah yield to the Senator from Montana?

Mr. Sutherland. I do.

Mr. Walsh. It does not occur to me that the provision needs any further amendment. In any case, the provision to which our attention is now directed by the Senator was in the bill when it came from the House. The Senate acceded to that provision of the bill and added a provision of its own. No question has ever been raised up to the present time touching the feature of the bill to which the Senator from Utah adverts, and it would seem as though the time had quite gone by when any amendment to the bill affecting that particular clause would be properly considered.

I desire to say in this connection, however, it does not occur to me that any difficulty at all will arise under the circumstances such as are mentioned by the Senator. If, indeed, the subject does arise in two or three different States, ob-

viously the venue will be in any one of the States in which the proceeding may be begun; that is to say, if the matter does not relate to transportation or "is not made upon the petition of any party," and it should arise in the States of Utah, Wyoming, and Nebraska, for instance, it seems to me the venue could be laid in any one of these three States.

Mr. Sutherland. I am not at all certain that that is so.

Mr. Poindexter. Mr. President —

The Vice President. Does the Senator from Utah yield to the Senator from Washington?

through several States, therefore through several Federal

Mr. Sutherland. In just a moment. The original House provision, beginning in line 15, reads:

> "Shall be in the judicial district where some or all of the transportation covered by the order has either its origin or destination"—

showing that he house evidently considered that it was necessary, if it so desired to put the venue in any one of several districts, to say so, because they say, "where some or all of the transportation covered" had its origin.

The element of confusion, as I understand it, is introduced by the Senate amendment, which alters the sense of the original House provision, and with that amendment it provides, in substance, that in some cases which relates to transportation the venue shall be in the district where the matter complained of in the petition arose.

Mr. Walsh. I desire to say to the Senator from Utah in

explanation of the Senate amendment, because my recollection is he was not here at the time, that it was suggested upon consideration that under the provision of the bill as it came from the other House the carrier, who under all ordinary circumstances would be the party who would appeal to the Court for relief from any order that was made by the Interstate Commerce Commission, would have an option to lay the venue either in the State in which the transportation originated or in the State in which it terminated, notwithstanding the petitioners would be confined to only one State; in other words, it was not intended to give an option to the carrier to select the venue as his own interest might seem to dictate, but to fix it definitely in the place where was the residence of the petitioners who give rise to the proceedings in the first place.

Mr. Sutherland. Mr. President, I do not care to pursue that matter further; it has probably passed beyond the stage where we can help it, but I—

Mr. Poindexter. Mr. President, before the Senator from Utah leaves that point I think he ought to call attention also to the confusion which is involved in the statement of the class of actions, being those which do not relate to transportation, and cases that do not come up on the petition of any party. Then the language fixes the venue of that class of cases by reference to a matter complained of in the petition before the Commission.

Mr. Sutherland. I was just going to call attention to that.

Mr. Poindexter. The matter complained of in the petition before the Commission is described as that in which there is no petition.

Furthermore, I make this further suggestion: it seems to me if there is any possibility of revising the form of this provision, it ought to be borne in mind. The language goes on to add another class:

> "And except that where the order does not relate either to transportation or to a matter so complained of before the Commission"—

That is exactly the same class that was prescribed in the previous phrase where the number "63" occurs—

> "where the order does not relate to transportation or is not made upon the petition of any party."

That is the same class of cases. Then it goes on to say:

> "And except that where the order does not relate either to transportation or to a matter so complained of"—

That is, upon the petition of the party—

> "the matter covered by the order shall be deemed to rise in the district where any one of the petitioners in Court has either its principal office or its principal operating office."

The language is absolutely conflicting and almost impossible of construction so as to be consistent or coherent.

Mr. Sutherland. I was about to call attention to the very thing of which the Senator from Washington has spoken. The whole trouble arises from the introduction by the Senate of

the amendment. If the Senate had left the House amendment alone, the trouble could not have arisen. The Senate amendment is:

"Or is not made upon the petition of any party."

Having already provided substantively with reference to cases which do not arise upon any petition at all, then it is provided that—

> "the venue shall be in the district where the matter complained of in the petition before the Commission arises."

It is an absolute contradiction in terms. Provision is first made for a case in which there is no petition at all, and then the venue is to be tested by a petition which does not exist.

Mr. Walsh. Mr. President, I think the Senator is quite in error about that. It is the petition of a party. Every proceeding is commended upon petition or it is initiated by the Commission itself. Of course there has got to be some kind of a proceeding; some kind of a basis for it.

Mr. Sutherland. How can there be a petition without a party to the petition?

Mr. Walsh. Because the Interstate Commerce Commission itself may institute proceedings before the Interstate Commerce Commission. Then it is not made on petition.

Mr. Sutherland. Not on petition, certainly. The Interstate Commerce Commission does not petition itself.

Mr. Walsh. The word "petition" there, I apprehend, does not necessarily imply a prayer, because the term, as the

Senator from Utah well knows, is frequently used to signify the declaration of complaint on original proceedings in any cause.

Mr. Sutherland. If a matter comes before the Commission or before a Court upon a motion of the body itself, certainly that matter does not arise by petition; it is a matter that is brought up on the motion of the Court or by the Commission. When we speak of a petition, we necessarily imply a petition of somebody, and that somebody is a party. Then we provide, that in cases of that kind, which do not arise upon petition, the petition, which does not exist, shall govern the matter of venue.

Mr. Overman. Mr. President, there is no question upon this. It is already agreed to. I move—

Mr. Sutherland. I would like to ask the Senator from North Carolina whether it would be possible to reconsider the vote by which amendment numbered 63 was agreed to?

Mr. Overman. No, Mr. President; because the matter has been in conference; it has been agreed to by the House of Representatives, and it is out of our hands. This can be corrected by future legislation if there is any trouble about it, but it can not be now corrected here. It has passed beyond that stage. The language was not put in the bill on the floor of the Senate, but it came from the other body.

Mr. Clapp. While it may be better to let the matter go, to be subsequently corrected, I would not want to sit in the Chamber and be estopped by a declaration that a motion for

the adoption of a conference report is no less subject to reconsideration in this body than any other motion, though I quite agreed with the Senator from North Carolina that perhaps, in view of the situation, it is better to let this go now and correct it by subsequent legislation.

Mr. Martin of Virginia. Mr. President; while there is some little confusion in the language, I don't think there will be any trouble in the proper court taking jurisdiction. I do not believe, as a matter of practice, in the interpretation of this law and its enforcement that there can be any difficulty about a court taking jurisdiction and placing the venue in the place where the matter arose. Although it was not supported by a petition the Court would not be deterred by the inaccurate use of that language without explanation to forego a jurisdiction manifestly intended to be vested in it.

My own judgment is that it will not lead to any serious disturbance in the administration of this law; but, granted, we are consuming time unnecessarily. It is impossible for us to correct this matter now. If this bill were to go back to conference we would be confronted with difficulties. I have no idea that there is a quorum of the House of Representatives in the City of Washington, and it would be absolutely futile for us to throw this bill back into conference unless we intend to indefinitely postpone it.

Mr. Sutherland. Let me ask the Senator from Virginia this question: he thinks it is a matter that would be easily taken care of. The language of the provision now is that

where the order "is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises."

Mr. Martin of Virginia. I think —

Mr. Sutherland. Just a minute. That is the test of jurisdiction or of venue. Let me ask the Senator this question: suppose that an order is made hereafter not upon the petition of any party, where is the venue of that order?

Mr. Martin of Virgina. It will be held where the cause of action arose under it.

Mr. Sutherland. Oh, no; it does not say so.

Mr. Martin of Virginia. I think that is the way the Court would interpret it.

Mr. Sutherland. Where does the Senator find that provision?

Mr. Martin of Virginia. That is, if the Court treated the language "in the petition" as having been obliterated, as having no intelligent application to the case, they would place the venue where the cause of action arose.

Mr. Sutherland. But this is an exception, and it must be tested by its own provision. That exception is that where the order "is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition"—which does not exist—"before the Commission arises."

Mr. Martin of Virginia. My interpretation of the provision that when the order does not relate to transportation or

is not made upon petition of any party the venue shall be is the district where the matter complained of in the petition before the Commission arises, is that they will treat it as if the words "complained of in the petition" were omitted from the statute entirely.

Mr. Poindexter. Mr. President—

Mr. Martin of Virgina. The Court would treat it in fixing the venue as if those words were omitted from the statute, because they can not be controlling, they can not be pertinent, when no petition has been filed. Therefore, the Court would treat those words as omitted and fix the venue in the place where the matter complained of arose. I do not believe that there will be the slightest difficulty in the way of the Court in giving an interpretation that would fix the jurisdiction exactly as the statute intended it to be fixed. It is a little—

The Vice President. Does the Senator from Virginia yield to the Senator from Washington?

Mr. Martin of Virginia. In one moment I will yield to the Senator. It is a little inaccurately expressed; there is a little confusion in the language; I can not undertake to gainsay that; but I believe it is a confusion for which the courts would readily find relief.

Now, I will say to the Senator from Washington that I was occupying the floor by the courtesy of the Senator from Utah (Mr. Sutherland.)

Mr. Poindexter. If the Senator from Utah will allow me, before the Senator from Virginia takes his seat I will say I know courts frequently do relieve statutes of patent inconsistencies by disregarding certain words which have no meaning when the statute can not be construed without such action. The sentence which the Senator has read, it is true, might be so construed, but how would the Senator relieve the embarassment which comes up in the next phrase, which not only includes a word, which is without meaning, but states an exactly opposite contrary venue? The phrase which the Senator has just discussed fixes the venue in the district where the matter arises, if we leave out the words which the Senator says a Court will leave out. The next one fixes it in the same class of cases upon an entirely diferent rule, namely, in the district "where one of the petitioners in Court has either its principal office or its principal operating office"—an exactly opposite rule in the same class of cases. The fact of the case is, there is no occassion at all to have that clause in the statute. It merely repeats a statement of the same class of cases and provides a different venue for them. I would state, merely by way of suggestion, for there is apparently no way of correcting it now, that the provision would be cleared up if you would strike out entirely the words "complained of in the petition before the Commission," and then strike out further, beginning with the word "and," in line 23, the remainder of that line, all of lines 24 and 25, and lines 1 and 2 on page 38, down to the word "office," and including that word in line 3

on page 38. With those words stricken out the provision would be complete and would be perfectly clear.

Mr. Martin of Virginia. The trouble is that the bill is not in the stage—

Mr. Poindexter. If the Senator will allow me to complete my sentence—that would cover every possible case. In the first place, in those cases which arise upon petition the venue would be in the district in which the petitioner resided upon whose petition the order was made, and in those cases which do not relate to transportation, and are not brought upon petition the venue would be where the cause of action arises.

Mr. Borah. Mr. President, I agree with the suggestion of the Senator from Utah (Mr. Sutherland) as to what might be called the ambiguous or unfortunate use of the words referred to, but I am inclined to agree with the Senator from Virginia (Mr. Martin) as to the manner in which the Court would construe the provision. The provision reads:

> "Or is not made upon the petition of any party, the venue shall be in the district where the matter complained of in the petition before the Commission arises."

The words "in the petition" are, of course, in a sense merely explanatory of the complaint. There might not be a technical petition, and yet in contemplation of law there would be a petition in whatever form the matter arose before the Commission, and it seems to me that the Court would not have very much difficulty in arriving at the conclusion that what Congress intended in its unfortunate use perhaps of the language, was that the venue should arise where the subject

matter complained of arose. I think that would be the construction of it.

Now, as to the suggestion which has been made by the Senator from Washington (Mr. Poindexter), I do not exactly catch his suggestion, but the provision goes on to say:

> "And except that where the order does not relate either to transportation or to a matter so complained of before the Commission"—

If it arose out of the proposition covered by neither one of those expressions, then—

> "the matter covered by the order shall be deemed to arise in the destrict where one of the petitioners in Court has either its principal office or its operating office"—

Does the Senator from Washington think that that covers a venue which is not covered by the other proposition at all, because one of the others relates alone to transportation and the other to the matter complained of; but when neither matter is covered; that is to say, where the matter before the Commission relates neither to transportation nor the matter complained of, the venue shall be at the principal place of business.

Mr. Poindexter. Mr. President, it seems to me that it describes the same class of cases described in the clause immediately preceding. I don't see how a matter could be complained of before the Commission unless it is complained of by petition, and in all that class of cases where the complaint is made by petition and where it relates to transportation the venue is stated in amendment No. 62. Where it is not com-

plained of by petition and does not relate to transportation the venue is stated in amendment 63. They cover all cases, but a third venue is stated for the same class of cases.

Mr. Walsh. Mr. President, I want to add just a word with respect to this discussion. The significance of the language is to be determined in connection with the proceedings before the Interstate Commerce Commission. Those proceedings belong to two classes. One class are proceedings that are initiated upon the petition of a party; the other class are proceedings that are initiated by the Interstate Commerce Commission itself. The language was intended to cover the venue of both of those classes.

The first provision covers the cases in proceedings initiated upon the petition of a party in relation to transportation, while the other is intended to cover the cases in proceedings initiated by the Commission itself, and not brought by any party at all. When the Commission itself initiates proceedings it does so upon some foundation, some charge, some writing. That may not be properly denominated by the word "petition," but no one doubts what the significance of the word there is. Exactly the same difficulty would arise if you should cut out the words "of the petition" and should say that "the venue shall be where the matter complained of arose," but inasmuch as no one has filed any technical complaint you might say that the matter is not complained of. Of course if you give an exceedingly technical meaning to the language there could be no complaint without a party who is complaining, and yet the word "petition" is frequently used—and used in many

of the code states—simply to designate the initial pleading upon which the proceedings are instituted, and that is undoubtedly what it means here.

Mr. Sutherland. Mr. President, it may be that the courts will come to relieve this situation and straighten out this matter. As has been said by the Chairman of the Committee, the matter has passed the point where this body can do anything about it; but I can not let the matter be finally disposed of without saying that it is a piece of exceedingly loose legislation. It is so unhappily worded and there is so much confusion in it that a responsible legislative body like the Senate of the United States ought to be ashamed to let it go upon the statute books.

Mr. Overman. I will say to the Senator that if he feels that way about it it is his duty, as a member of the Senate, to introduce a resolution to correct it. It can be done in that way.

Mr. Cummins. Mr. President, may I ask the Senator from North Carolina whether the amendment No. 61 has passed beyond consideration here?

Mr. Overman. Yes. Does the Senator wish to know what has been done with the amendment?

Mr. Cummins. I should like to know.

Mr. Overman. The House agreed to the Senate amendment introduced by the Senator from Montana (Mr. Walsh), which struck out those lines.

Mr. Cummins. So it has really gotten beyond the jurisdiction of the Senate?

Mr. Overman. Yes.

Mr. Martin of Virgina. Absolutely.

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JURISDICTION

The District Court was convoked under the Urgent Deficiencies Act (ch. 32, 38 Stat. 219, 220). The final decree was entered January 15, 1925 (Tr. 39). The appeal was allowed February 18, 1925, which was less than the sixty days provided by the Act.

QUESTION

Was the District Court for the Western District of Texas without jurisdiction to entertain the petition and was the order sustaining the special plea which challenged the venue and jurisdiction correct?

Under the averments of the bill of complaint (Tr. 3) the order of the Commission was entered on the applications of the Southern Pacific and El Paso & Southwestern companies, neither of which has its residence in the Western District of Texas (Tr. 2, 14, 34).

Urgent Deficiences Act, approved October 22, 1913, provides (38 Stat. 219–220):

> The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so

complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

STATEMENT

Southern Pacific Company is a corporation organized and existing under and by virtue of the laws of Kentucky and operates railroads in Oregon, California, Nevada, Utah, Arizona, and New Mexico (Tr. 2). El Paso & Southwestern Railroad Company is a corporation incorporated under the laws of Arizona and operates railroads in Arizona, New Mexico and Texas (Tr. 2).

On July 1, 1924, Southern Pacific and El Paso & Southwestern, by their joint application under paragraph 2 of Section 5 * of the Act, applied for an order approving and authorizing the acquisition by the Southern Pacific of the control of the El Paso & Southwestern System, by stock ownership through purchase of the interest therein of the El Paso &

* (2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises (41 Stat. 481).

Southwestern, and by lease (Tr. 24). Under the provisions of Section 20a, the Southern Pacific applied for authority to issue $28,000,000 of common capital stock and $29,400,000 of bonds. By a separate application on the same date the Arizona Eastern Railroad Company requested a certificate that the present and future public convenience and necessity required the construction by it of a line of 115 miles of railroad, all in the State of Arizona, the lines to be constructed as extensions of existing lines of the Arizona Railroad and to connect with the Southern Pacific. Protests were filed but none of the protestants were represented at the hearing. Intervening petitions in support of the applications were also filed and appearances entered on behalf of the Arizona Corporation Commission, the State Corporation Commission of New Mexico, and a number of cities, towns, and commercial organizations of communities served by the applicants and representations in favor of granting the authority sought were made on behalf of the Governor of Arizona (Tr. 25).

By its order dated September 30, 1924, effective in 30 days, entered after a full hearing, the Commission granted the application (Tr. 30).

George H. Park and James F. Kilcrease allege that they are resident-citizens and taxpayers of El Paso and compose the partnership of Home Furniture Company. They bring the suit individually and as partners (Tr. 1). They deal in new and secondhand furniture with "their principal place of business at El Paso" (Tr. 1). They ship furniture over the lines of South-

ern Pacific Railway and El Paso & Southwestern Railway "and are engaged in shipping goods, wares, and merchandise in interstate commerce" (Tr. 2).

Appellants' allege that the Southern Pacific lines run from points in Texas to and through El Paso, in a generally easterly and westerly direction, to Los Angeles (Tr. 5). The two systems parallel across El Paso and between it and Tucson, Arizona, and the common points west of El Paso. The two systems have been and are competitive for passenger and freight traffic of a transcontinental as well as a local nature. The two lines serve both southern New Mexico and southern Arizona, as well as the rapidly growing city of El Paso, a jobbing and shipping center, of developing proportions, now having a population of more than 80,000 people (Tr. 6). Because of the competition existing between the two systems the rivalry has been and is keen, and, as a consequence, the public has had better service for both passenger and freight traffic. As a result of the competition, and as an outgrowth thereof, both lines have been active in solicitation of business for and through the sections traversed by their lines, and at all points between and including Chicago and Los Angeles, and at such intermediate places as El Paso, Texas, Tucson, Arizona, Deming and Lordsburg, New Mexico. In order to secure and hold the business, both lines of railroad have endeavored to give the maximum service, have advertised extensively, and aided in upbuilding and promoting the principal communities on their lines, including the

city of El Paso. The competition has worked a gradual improvement in the treatment by both lines of the public and their practice, rules, and regulations in regard to their methods of doing business, and has facilitated the prompt handling of claims for shippers. The Southwestern System originates a rich traffic for which both the Rock Island Railroad and the Southern Pacific compete eastbound. It is that section which is parallel to the Southern Pacific as far as Tucson which originates a great deal of lucrative business. The El Paso & Southwestern System was built for the purpose of bringing about competition in rates and service with the Southern Pacific System, and appellants are informed and believe that as a resultant reduction in the rates through the construction of the El Paso & Southwestern Railroad the line of railroad was practically paid for within five years after its construction through savings in freight charges. The application of the Southern Pacific to the Commission had, for its primary purpose, the absorption by the Southern Pacific of the Southwestern System in order that conditions may be restored as nearly as may be before the construction of the Southwestern System and for the purpose of suppressing the competition and rivalry that existed between the two systems, as aforesaid, to the end that the Southern Pacific may obtain a complete monopoly of the freight and passenger business to and through southern New Mexico and southern Arizona, and for the purpose of depriving shippers and others of the

privilege of shipping and traveling over one of two competing lines of railroad at their option (Tr. 6).

Appellants further allege that the Southwestern has maintained, and now maintains, its general offices and shops at El Paso where it employes several hundred men and women who live in and about El Paso, who support themselves and their families, who add substantially to the population of the city, and who put in circulation many thousands of dollars, all of which adds to the material happiness and prosperity of the community, increases the value of real and personal property, and consequently assists business enterprises within the city. The Southern Pacific likewise maintains shops at El Paso but its general offices are at San Francisco. If the two systems are fused into one, it is the purpose of the Southern Pacific to consolidate the two shops and either to let many men out of employment or to remove them to other places, to the detriment of the community as well as to those living in El Paso and having business enterprises therein, including the appellants (Tr. 7).

Appellants further allege that they will be greatly injured by the loss of customers who will be deprived of their positions, or because they are moved to other points; that if the consolidation, merger and fusion of the two systems takes place, the appellants will be greatly damaged and injured in their business and property by the loss to the general prosperity of the community of which they are a part, due to

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the letting of men out of employment and the removal of others with their families to distant places, and the reduction in population that will necessarily ensue, and because of the decrease in the amount of expenditures in the community, which expenditures have heretofore contributed either directly or indirectly to the success of appellants' business (Tr. 7).

Appellants further allege that for several years they have had and now have the option and right of routing their furniture purchased and sold, by way of either system, and particularly with reference to shipments of furniture going from El Paso to southern New Mexico and southern Arizona, a privilege and right of substantial and pecuniary value to appellants, and if the merger is permitted to take place appellants will be deprived of this privilege, right, and option and will be compelled to ship over the Southern Pacific System alone to their damage and injury (Tr. 7). Because of the competition and rivalry existing between the two systems appellants have, along with the general public, had better service from the two railroads and better treatment, and will continue to have if the merger is not consummated. If the consolidation and merger is permitted, appellants and their business will be greatly injured and damaged by the depreciation in service and the increase in rates, and the laxity in handling of claims and traffic that is the natural result of the suppression of competition and the growth of monopoly. If the merger is consummated, because of the consequent decrease

in the population of El Paso and the cutting down of the amount of money heretofore placed in circulation, property, both real and personal, belonging to appellants, including the business owned by appellants in El Paso, will be depreciated in value and cause appellants great financial and pecuniary loss (Tr. 8).

ARGUMENT

THAT THE ORDER RELATES TO TRANSPORTATION IS SHOWN BOTH BY THE FACE OF THE ORDER AND BY THE AVERMENTS OF THE BILL,

In its report, which is a part of the order (Tr. 30), the Commission found (Tr. 27):

> The lines of the Southwestern System are intermediate between the lines of the Southern Pacific, and the lines of the Chicago, Rock Island & Pacific Railway System, hereinafter called the Rock Island. The lines of the three systems constitute one of the principal direct routes between southern California and the Missouri River and Chicago, and are included in the Southern Pacific-Rock Island System in the grouping of railroads under the tentative plan for consolidation of railroad properties promulgated by us under date of August 3, 1921. Consolidation of Railroad Properties, 63 I. C. C. 455. Acquisition of control of the Southwestern System by the Southern Pacific is in harmony with this plan. It will result in direct physical connection between the lines of the Southern Pacific and the Rock Island, will assure the continuance of this route, and will increase its competitive strength as compared with the routes of the

> Sante Fe and Union Pacific. While the lines of the Southern Pacific and Southwestern System west of El Paso may be said to be parallel they serve different communities and industrial sections. The points at which the two systems meet are important points of interchange of a large traffic to and from communities served by one but not the other. Better coordination and more efficient and economical operation will follow as to this traffic and as to transcontinental traffic in connection with the Rock Island, and relations to the traveling and shipping public and to public authorities will be simplified and improved.

Another part of the order which relates specifically to transportation is as follows:

> *It is ordered*, That the Arizona Eastern Railroad Company, or its lessee, when filing schedules establishing rates and fares to and from points on said new lines of railroad, shall in such schedules make specific reference to this certificate by title, date, and docket number (Tr. 31).

Notwithstanding that part of the order in specific terms relates to transportation, and notwithstanding the averments of the bill, the appellants assigned as the first error that the Court erred in holding the order of the Commission referred to in the decree related to transportation (Tr. 40). Appellants now argue that the order does not relate to transportation. Appellants should be held to the case they undertook to make by their bill, and not to the case which they now seek to make by their brief.

The suit is brought to enjoin, set aside, annul, and suspend the order of the Commission (Tr. 3) which the appellants aver affects them, in that it disturbs the transportation rules and regulations to which they were accustomed. That is their sole and only interest. The District Court sustained that view and dismissed the bill for want of jurisdiction (Tr. 39). That the order was entered on the applications of these carriers is not, and can not be, denied. The machinery of the Commission was set in motion by no other means whatsoever. The Interstate Commerce Act defines transportation.

Section 400 of the Transportation Act of 1920, paragraph (3), which amended paragraph 1 of the Interstate Act (ch. 91, 41 Stat. 475), provides:

> * * * The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported * * *.

Section 402 of the Transportation Act of 1920, paragraph (10), which amended paragraph 1 of the Interstate Commerce Act (ch. 91, 41 Stat. 476), provides:

> (10) The term "car service" in this Act shall include the use, control, supply, movement distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the

> transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act.

Opposing counsel cite definitions of *transportation* from dictionaries and court opinions, all to the effect that transportation consists of "carriage from one place to another." Those definitions are not disputed, but in connection therewith the definition of *transportation* as laid down by the Interstate Commerce Act should also be considered in any case arising under that Act. The allegations of the bill would appear to bring the order within all of these definitions.

Skinner & Eddy Corporation v. *United States*, 249 U. S. 557, 563, is controlling here. In that case this Court, speaking through Mr. Justice Brandeis, said:

> *Second.* The defendants contended also that if the subject matter was within the jurisdiction of a District Court of the United States it was not within that of Oregon. The objection is based upon the Act of October 22, 1913, c. 32, 38 Stat. 208, 219, which declares: "The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made." And it is asserted that the parties upon whose petition the order was made are the Merchants' Association of Spokane, a resident of the Eastern District of Washington, and the Railroad Commission of Nevada, a resident

> of the District of Nevada. The applications of these parties, filed in March, 1916, were doubtless instrumental in securing a reopening of the proceedings which resulted in the order complained of. But the proceedings in which the order was made were the original applications of carriers for relief under the fourth section. The report and the order are entitled "In the Matter of Reopening Fourth Section Applications." One of the carriers which had made such application for relief from the provisions of the fourth section was a resident of Oregon, namely, the Oregon-Washington Railroad and Navigation Company; and as it was joined as defendant in the suit, the District Court for Oregon has jurisdiction over the parties.

It is not claimed that any of the companies who were parties to the applications before the Commission were residents of the Western District of Texas.

The bill of complaint contains allegations respecting the power and authority of the Southern Pacific Company under the constitution and laws of the State of Kentucky (Tr. 10, 14). If charter power is to be considered, the United States District Court for the District of Kentucky would seem to be quite as capable of determining the power and authority of the Southern Pacific to do what it did under and by virtue of the laws of that State, as the United States District Court for the Western District of Texas. The same may be said of El Paso & Southwestern which was incorporated under the laws of Arizona.

Appellants were aware that it was necessary for them to allege that the order subjected them to some legal injury, actual or threatened. The injury which they undertook to allege was a transportation injury. They alleged that, as they could allege no other injury whatever. It would not seriously be claimed that the alleged depletion of El Paso's population of 80,000 brought about by the removal of a railroad shop was an interest which would justify a court of equity in enjoining an order of the Interstate Commerce Commission at the instance of a furniture dealer who fears he might lose customers. Opposing counsel were aware of the case of *Hines* v. *United States*, 263 U. S. 143, 148, in which the decision was announced on November 12, 1923. In that case it was held that the plaintiffs "must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do."

In the instant case, in order to gain any standing whatever in the court, appellants assailed the order and alleged its effect upon the appellants and their business, because of the change in transportation conditions and in the use of the transportation facilities. They are thus pinioned between the proposition, on the one side, that they must allege a legal injury, and the proposition, on the other side, that the order in substance and effect relates to transportation and affects them injuriously. The latter defeats the jurisdiction. The order, by its terms, also relates to transportation.

The State of Texas and its Railroad Commission, by the Attorney General of Texas, appeared before the Interstate Commerce Commission (Tr. 4, 22, 23). But they did not come into this case. Nor did a single one of the numerous municipalities, chambers of commerce, traffic and trade associations, and other organizations who appeared before the Commission (Tr. 22, 23). The City of El Paso and the El Paso Freight Bureau filed an intervening petition before the Commission protesting against acquisition by the Southern Pacific of control of the Southwestern System. That petition was subsequently withdrawn (Tr. 25). With the exception of these two taxpayers, the whole World appears to be satisfied. They did not appear before the Commission, but their present counsel did as "*amici curiae*, protestants" (Tr. 4, 24).

CONCLUSION

The decree should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

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IN THE

Supreme Court of the United States

October Term, 1925.

No. 324.

HOME FURNITURE COMPANY, GEORGE H. PARK AND JAMES F. KILCREASE, ETC.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE SOUTHERN PACIFIC COMPANY, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF ON BEHALF OF SOUTHERN PACIFIC COMPANY AND EL PASO & SOUTHWESTERN RAILROAD COMPANY.

WILLIAM F. HERRIN,
H. M. GARWOOD,
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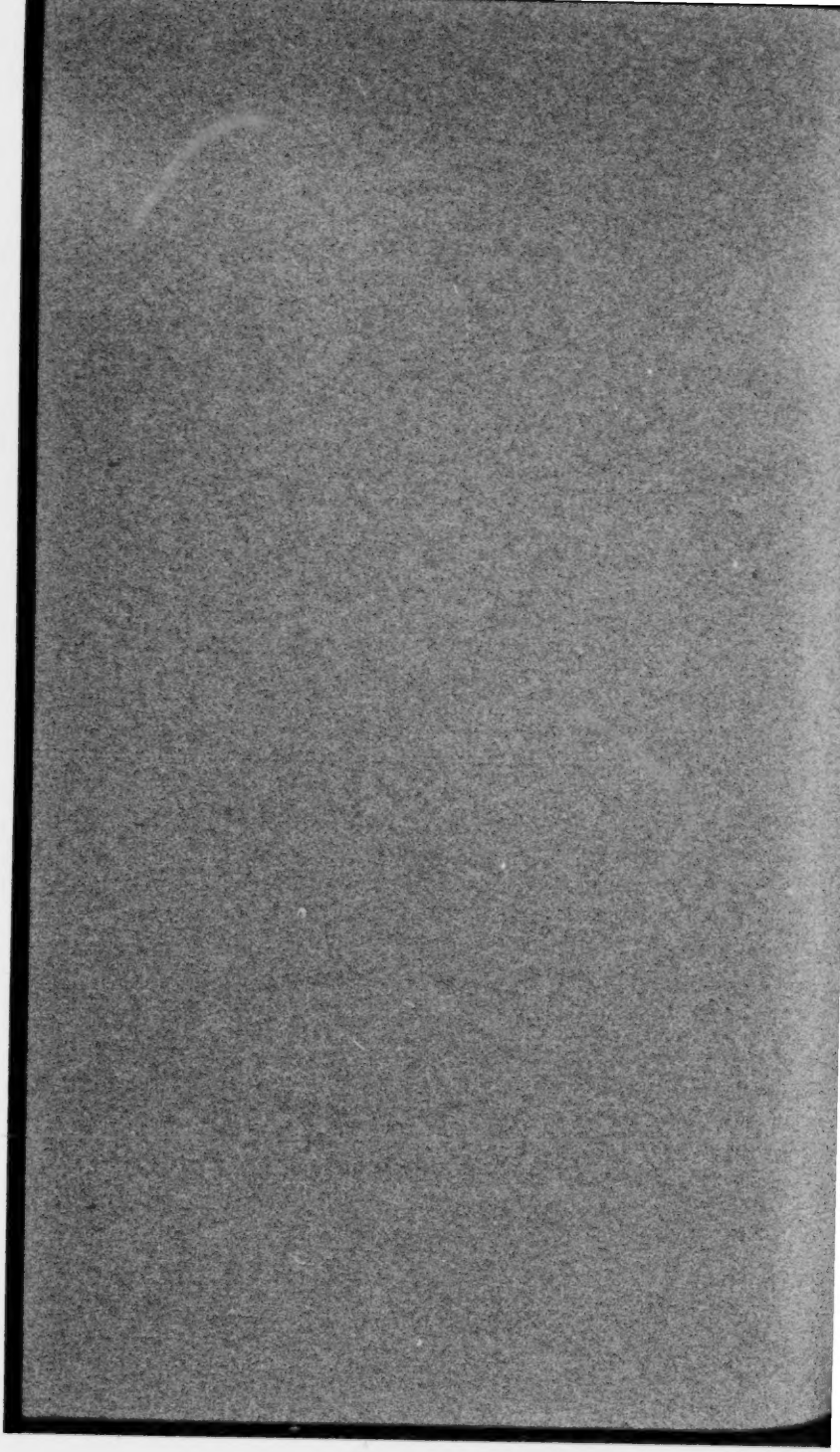

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I.

Statement of the Case.

This is a direct appeal under the Act of October 22, 1913 (38 Stat. 219) from a decree dismissing for want of jurisdiction, on an exception to the venue, a suit by appellants, plaintiffs below, to set aside an order of the Interstate Commerce Commission rendered upon peti-

tion pursuant to paragraph (2) of Section 5 of the Interstate Commerce Act, as amended, and authorizing the acquisition of control by the Southern Pacific Company of certain lines of railway known as the El Paso and Southwestern System. The parties defendant are the United States and the Interstate Commerce Commission, the Southern Pacific Company and El Paso & Southwestern Railroad Company. The bill of complaint shows that the order complained of was rendered on the joint petition of the Southern Pacific Company, a corporation organized and existing under the laws of the State of Kentucky, and of the El Paso & Southwestern Railroad Company, a corporation organized and existing under the laws of the State of Arizona. The suit was brought in the District Court of the United States for the Western District of Texas, El Paso Division, which is not the judicial district wherein is the residence of either of the petitioners before the Commission. All defendants moved to dismiss the suit on the ground that the proper venue was in the District Court of the United States for the District of Arizona or for the District of Kentucky, it affirmatively appearing on the face of the bill of complaint that the order in question related to transportation and was rendered upon petition.

The Act of 1913 contains a clause prescribing the venue for suits to enforce, suspend or set aside any order of the Interstate Commerce Commission, and this case involves the construction and application of that clause. For the purposes of this summary statement of the case it suffices to say that the venues prescribed are in the judicial district wherein—

(1) the residence of the party or any of the parties upon whose petition the order was made, when the order relates to transportation and was made upon petition;

(2) where the matter complained of in the petition before the Commission arises, when the order

does not relate to transportation but is rendered upon petition;

(3) where the matter complained of in the petition before the Commission arises, when the order relates to transportation but is not rendered upon petition;

(4) where one of the petitioners in court has either its principal office or its principal operating office; when the order does not relate to transportation *and* was not rendered upon petition, the matter covered by the order being deemed in such case to arise in the district of the principal office or operating office of one of the petitioners in court.

As the order of the Commission complained of was made upon petition we are not concerned with venue (3) or venue (4). The questions for decision on this appeal are whether the proper venue for plaintiffs' suit was venue (1) or venue (2); and if venue (2), whether the subject matter of the petition before the Commission upon which the order was made can be regarded as arising at El Paso. Plaintiffs' contention is that the order in question does not relate to transportation; that the venue is accordingly in the judicial district where the matter before the Commission arose, and that the matter before the Commission can be regarded as having arisen in every judicial district where the railroads affected by the order run, including the El Paso Division of the Western District of Texas. Defendants contend that the order of the Commission relates to transportation and that, as the suit was admittedly not brought at the residence of either of the parties upon whose petition the order was made, the motions to dismiss were properly sustained. They dispute also the correctness of the proposition that, if the order should be held not to relate to transportation, the matter thereof must be regarded as having arisen in each and every judicial dis-

trict traversed by any of the railroads affected by the order.

In the further statement of the case we shall give a synopsis of plaintiffs' bill of complaint and a summary of the proceedings in the court below, and call attention to such pertinent features of the order of the Commission as may not be brought out in the discussion of the pleadings. We attach importance to the synopsis of the bill of complaint, for it will clearly appear therefrom that the gravamen of the complaint is the alleged direct and necessary effect on transportation services and charges of the order which, for the purposes of this appeal, plaintiffs now claim has no relation to transportation. In other words the bill of complaint shows that plaintiffs are dependent on the defendant railroads to transport to and from their place of business the furniture which they are engaged in buying and selling; that prior to the order the defendants were performing these transportation services in competition with each other; that the effect of the order, in transferring the possession of the El Paso and Southwestern's transportation properties to the Southern Pacific Company to be operated and managed by it, will be to put an end to the competitive transportation services which plaintiffs have been enjoying and to expose them in the future to higher transportation charges for less valuable and efficient transportation service, to their irreparable damage and injury. Here, then, we have a case arising out of provisions of "The *Transportation* Act, 1920", brought against defendants, whose business is that of *transportation*, by plaintiffs whose connection with defendants is that of one requiring *transportation* services from them, in which an order of the Commission is complained of because of its effect upon the *transportation* services that plaintiffs will thereafter receive and the *transportation* charges they will thereafter have to pay, and we have the plaintiffs now seeking a reversal of the decree appealed from on the ground that the order in question has no relation to transportation!

Synopsis of the petition or bill of complaint.

Plaintiffs are the Home Furniture Company, a co-partnership, and the two members of the partnership. Clause I of the bill of complaint states that plaintiffs are resident citizens of El Paso, Texas, engaged in the furniture business, and that, as a part of their business, they buy and sell new and second hand furniture and employ the transportation lines of the Southern Pacific System and the El Paso and Southwestern System for the transportation of their purchased and sold furniture; and that, accordingly, they are now engaged in shipping furniture and in using the lines of the two railway systems for that purpose, and are engaged in shipping goods and merchandise in interstate commerce.

Clause II states that defendant Southern Pacific Company is a corporation organized and existing under the laws of the State of Kentucky and a carrier by railroad engaged in the transportation of passengers and property subject to the Interstate Commerce Act. The states in which it operates railroads are named.

Clause III states that defendant El Paso and Southwestern Railroad Company is a corporation incorporated under the laws of Arizona, operating railroads in Arizona, New Mexico and Texas, and engaged in the transportation of passengers and property subject to the Interstate Commerce Act; that it is a part of the El Paso & Southwestern System (thereafter referred to as the Southwestern System) consisting of certain named railroad companies, all of whose outstanding stock and a portion of whose outstanding bonds are owned, directly or indirectly, by the El Paso & Southwestern Company, a holding company of New Jersey, and all of whose carrier properties are operated under lease by the defendant El Paso & Southwestern Railroad Company.

Clause IV contains the formal jurisdictional averments, describing the suit as of a civil nature in equity, arising under the laws and constitution of the United

States and brought to enjoin, set aside, etc. an order of the Interstate Commerce Commission, the matter in controversy, exclusive of interest and costs, exceeding $3000.

Clauses V, VI, VII and VIII narrate the proceedings before the Interstate Commerce Commission on the "application or petition" of the two defendant railroad companies, and annex as Exhibit C the report and order of the Commission and make the same by reference a part of the bill. A summary of the narrative is as follows: On July 1, 1924, the two defendant railroad companies filed with the Interstate Commerce Commission a petition seeking authority for the Southern Pacific Company to acquire control of the Southwestern System (a) by stock ownership through the acquisition of all the interests therein of the El Paso & Southwestern Company, and (b) by lease from the El Paso & Southwestern Railroad Company of its lines of railroad and by assignment from the last named Company of the leases under which it operated the other Southwestern System lines, the proposed lease, as well as the leases to be assigned, being leases for the period of one year, and thereafter until terminated by either party upon thirty days notice. The petition covered incidentally an application on behalf of the Southern Pacific Company for authority to issue the securities to be exchanged for the securities proposed to be acquired from the El Paso & Southwestern Company. At the same time a separate application was filed on behalf of the Arizona Eastern Railroad Company for a certificate of convenience and necessity, covering the construction of certain new lines in Arizona. Hearings on the applications took place before Division 4 of the Commission, consisting of three Commissioners, and thereafter, as a result thereof, a report and decision was rendered and an order made by Division 4, dated September 30, 1924, (one Commissioner dissenting) authorizing the acquisition of control and the issue of securities applied for, as well as the new construction. Under the authority of this report, decision, and order the acquisi-

tion of control approved will be effected unless restrained by the Court.

Clause IX states the mileage (1139.9 miles) and the location of the Southwestern System, the principal termini being Dawson, New Mexico, Tucson and Clifton, Arizona. The Southern Pacific System is described as comprising, among others, lines of railroad running from points in Texas to and through El Paso in a generally easterly and westerly direction to California, and as being owned, directly or indirectly, by the Southern Pacific Company. It is alleged that the two Systems are parallel and competing lines within the meaning usually and customarily ascribed to those terms; that they are in competition with each other for passenger and freight traffic; that they serve both southern New Mexico and Arizona as well as the City of El Paso, a jobbing and shipping center of developing proportions, with a population of over 80,000 people; that because of such competition and as a consequence thereof the public has had better service for both passenger and freight traffic; that both systems have been active in the solicitation of business and, in order to secure and hold the same, have endeavored to give the maximum of service; that they have advertised extensively and have aided in upbuilding and promoting the principal communities on their lines, including El Paso; that such competition has worked a gradual improvement of their treatment of the public and in the rules, regulations and practices under which their business is conducted; that the Southwestern System originates a rich traffic for which the Rock Island Railroad and the Southern Pacific compete eastbound, the section of the Southwestern System parallel to the Southern Pacific as far as Tucson originating a great deal of lucrative business; that the Southwestern System was built for the purpose of bringing about competition in rates and service with the Southern Pacific System.

After thus describing the transportation conditions and activities of the defendant carriers, plaintiffs show

the transportation purposes of the application to the Commission and the order granted thereon by alleging that the application had for its primary purpose the absorption by the Southern Pacific System of the Southwestern System in order to restore conditions existing before the construction of the latter, and to suppress competition between them, to the end that the Southern Pacific might obtain a monopoly of the transportation business to and through southern New Mexico and Arizona and "for the purpose of depriving shippers and others of the privileges of shipping and travelling over one or two competing lines of railroad at their option" (R., 6).

There is no clause X.

Clause XI alleges that for many years the Southwestern System has maintained its general offices and shops at El Paso, furnishing employment to several hundred people, thus adding to the population of El Paso, putting many thousands of dollars in circulation and contributing to the prosperity of the city and to the value of property, and generally assisting business enterprises in the city; that the Southern Pacific Company likewise maintains shops in El Paso, but its general offices are at San Francisco; that, on information and belief, plaintiffs charge that it is the purpose of the Southern Pacific Company to consolidate the shops and to remove the general offices elsewhere, thus depriving many persons of employment or removing them to other places, to the detriment of the community, as well as of those living in El Paso, and having business enterprises therein, including these plaintiffs.

Clause XII states the injury and damage which plaintiffs will suffer by reason of the order complained of. This is a crucial part of the case, for, to sustain a suit of this kind, it is not sufficient merely to show the invalidity of the order; it must be shown also that the order alleged to be void subjects plaintiffs to legal injury,

actual or threatened. (*Hines, Trustees* v. *U. S.*, 363 U. S. 143.) Clause XII is important because it shows that, if and when this suit is brought in a court of competent jurisdiction and plaintiffs are called upon to meet the defence of want of interest entitling them to sue, their reliance must be upon the relation of the order in question to transportation, i. e., upon its effect on transportation service, transportation facilities and transportation charges. Plaintiffs first set up the loss and injury it is alleged will result to their business and property in consequence of the decrease in the population of El Paso and in the amount of money in circulation which will ensue when the number of the resident employees of the two systems is reduced by unified operation, damages obviously too uncertain and unsubstantial to meet the requirements of the law. They then allege that the order and the acquisition of control which it authorizes will cause them damage and injury as follows:

(a) They will lose the valuable right and privilege they have enjoyed for years of routing their furniture, purchased or sold, over either the Southwestern System or the Southern Pacific System and will have available for transportation of their goods only one transportation system.

(b) They will suffer loss and injury due to depreciation in service and the increase in rates, with laxity in handling claims and traffic, which will naturally result from the suppression of competition authorized by the order.

In other words the gravamen of the complaint is the effect on transportation facilities, transportation services and transportation charges that will be the necessary and direct result of the order attacked—being the order which, to sustain the venue chosen by them, plaintiffs now assert does not even relate to transportation.

As we are not now concerned with the merits of the case we shall deal very summarily with the remaining clauses of the bill that set forth the grounds upon which it is claimed that the order of the Commission is null and should be set aside. But, at the risk of the charge of inconsistency, we shall in stating each ground of attack call attention, *en passant*, to its absolute want of merit, our excuse being the desire to show that the effect of the dismissal of this suit on an exception to the venue will not operate any hardship but will dispose, quickly and cheaply, of a case which must be dismissed on the face of the bill of complaint in whatever venue brought.

Apparently unaware of the provisions of Section 17 of the Interstate Commerce Act, as amended, whereby the Commission is authorized to divide its members into divisions (each to consist of not less than three members) and to distribute its work or functions, in its discretion, between such divisions, and each division is empowered, by a majority thereof, to hear, determine, order, certify, report, etc. as to any such work or functions, any order, decision, report, etc. of any division to have the same force and effect as if made or done by the Commission, subject to a rehearing by the full Commission, plaintiffs charge that the order is null because made by Division 4 intsead of by the whole Commission.

Ignoring the provisions of paragraph (8) of Section 5 of the Interstate Commerce Act, which relieves any order of the Commission made pursuant to the foregoing provisions of the section from all restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable the carriers affected to do anything authorized or required by the order, or regarding paragraph (8) as unconstitutional, thus rendering nugatory the consolidation provisions of Section 5, as well as those relating to pooling and to acquisitions of control less than consolidation, plaintiffs, usurping the functions of the constituted representatives of the State of Texas and acting contrary to their wishes, as evidenced by their

acquiescence in the order, next assail the order because it overrides the prohibitions and restraints of the Constitution and laws of Texas against the combination by consolidation, lease or otherwise of parallel or competing railroads.

Not content with the part of a self-constituted and unwelcome champion of the laws and public policy of their own State, plaintiffs assume to vindicate the rights of the State of Kentucky and charge that the order is null and void because in conflict with prohibitions and restraints in the law of Kentucky similar to those alleged to exist in the law of Texas.

Failing to read aright what is writ large in the amendments made by the Transportation Act to the Interstate Commerce Act, especially the amendments of Section 5, namely, a change of the public policy of the country respecting combinations of railroads, as a result of which the Commission is empowered to authorize certain combinations of carriers, including acquisitions of control by purchase or lease, when found by it to be in the public interest, notwithstanding any resulting destruction or suppression of competition, the Commission being entrusted to weigh the public benefits and advantages of any proposed combination against any loss or lessening of existing competition, plaintiffs charge that the Commission's order is null and void because its effect is to suppress previously existing competition between the carriers affected by the order. Notwithstanding the provisions of paragraph (8) exempting the orders of the Commission from the prohibition of the Sherman law and the Clayton Act, plaintiffs would subordinate such orders to the prohibitions and policy of those statutes.

Having fallen into the error of treating an acquisition of control by one corporation over another, by means of purchase of stock and a short term lease, as a consolidation within the meaning of the consolidation provisions of the Transportation Act (paragraphs (4), (5), and (6) of Section 5 of the Interstate Commerce Act),

plaintiffs say that the Commission was without power to make the order in question until after the adoption and promulgation of a final plan of consolidation. The Congress that adopted the Transportation Act was unusually well informed concerning the subject it was legislating about and unusually careful and accurate in the language it employed. It must be presumed to have used the term "consolidation" in the same sense in paragraph (2) and in the immediately succeeding paragraphs, and always in accordance with its well established legal meaning. Moreover, it appears from the language of paragraph (6) that in order to effect a "consolidation", within the meaning of the statute, a *single corporation* must be created which shall *own* as well as operate all the property. Plaintiffs are virtually asking that the order in question be annulled because in making it the Commission construed the term "consolidation" in accordance with its established legal meaning and, by so doing, gave to the term an accurate and definite meaning, a great desideratum in the practical administration of the statute. It would not only create confusion, but tend to frustrate the purpose of Congress, to regard an acquisition of control of one corporation over another, by purchase of stock and/or lease, as a consolidation within the meaning of the consolidation provisions of the Transportation Act. Congress intended its scheme of consolidation to afford, or aid in affording, a permanent solution of the railroad problem; but an acquisition of control based on stock ownership or lease could be ended and the *status quo* be restored overnight.

The Order of the Commission.

The report and order of the Commission is annexed as Exhibit C and made by reference a part of the bill (R., 4), and will be found on pages 23-32 of the record. Intervening petitions in support of the application of the Southern Pacific Company and the El Paso & South-

western Railroad Company were filed and appearances entered on behalf of the Arizona Corporation Commission, the State Corporation Commission of New Mexico, and a number of cities, towns, and commercial organizations of communities served by the applicants, and representations in favor of granting the authority sought were made on behalf of the Governor of Arizona (R., 25). The city of El Paso and the El Paso Freight Bureau filed an intervening petition protesting against the proposed acquisition of control, but subsequently withdrew their protest (R., 25). The protestants were the Attorney General and Assistant Attorney General of Texas; Walter W. Page for Gilbert Chamber of Commerce; Andrew M. McDearmott on his own behalf; and Jos. U. Sweeney and Edward C. Wade, *amici curiae*. The other appearers are F. A. Jones and H. B. Wilkinson for Mesa Chamber of Commerce; F. A. Jones for Ray & Gila Valley Railroad Company; and E. L. Green for Casa Grande Chamber of Commerce; but their attitude towards the application is not disclosed. (R., 24). None of the protestants was represented at the hearing upon the application. The report states that their representations, however, were duly considered. (R., 25).

It appears from the report (R., 25) that the Attorney General of Texas made

> "certain representations with respect to the Texas companies embraced in the Southwestern System and has requested that any order entered by us be so conditioned as not to violate the provisions of the Constitution and statutes of that State relating to consolidation of Texas companies with foreign corporations, the acquisition of control by one corporation of another corporation owning or having under its control a parallel or competing line, and the leasing of railroads of Texas corporations by foreign corporations."

It appears from the bill of complaint (R., 9 and 10) that the two Texas corporations forming part of the South-

western System are the El Paso and Southwestern Railroad Company of Texas, owning only *four* miles of railroad, and the El Paso and Northeastern Railroad Company with a mileage of only *nineteen* miles (R., 9 and 10). The law of Texas in respect to railroad leases, Article 6697 of the Revised Statutes,[1] provides that any railroad not exceeding *thirty* miles in length, connecting at or near the state line with any other railroad, may be leased by the Company owning such other railroad, on such terms and for such time, not exceeding *ten* years, as may be approved by the railroad commission of Texas.

On September 30, 1924, a favorable report upon the application was made and an order approving and authorizing, as in the public interest, the proposed acquisition of control was entered. No rehearsing was applied for. No protestant has appealed to the court. We are, therefore, justified in saying that the constituted authorities and the people of Texas, including the City of El Paso and the El Paso Freight Bureau, acquiesced in the report and order of the Commission and joined with the States of Arizona and New Mexico and the communities therein to make unanimous the approval of the Commission's finding that the acquisition of control applied for was in the public interest. This general harmony was not disturbed until, on October 23, 1924, a single shipper, a partnership dealing in second-hand furntiure in El Paso, responded to the call of the *amici curiae* for a shipper in whose name to continue in the courts their lone opposition.

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[1] Art. 6697. Right to lease another road.—Any railroad not exceeding thirty miles in length, connecting at or near the state line with any other railroad, may be leased by the company *owning* such other railroad, on such terms and for such time, not exceeding ten years, as may be approved by the railroad commission of Texas; provided, that said commission may refuse to approve the same for any cause which it may deem sufficient; and provided, further, that at any time before or after the expiration of such lease, the same may be renewed or another lease executed, subject to the provisions and limitations of this chapter; and provided, further, that the provisions of this chapter shall not apply to railroads whose total mileage in this state may exceed thirty miles, although a portion thereof so connecting at the state line may not exceed thirty miles in this state. (Acts 1899, p. 73, sec. 1).

The report of the Commission speaks for itself. In conferring power upon the Commission to authorize an acquisition of control of the character now in question, when found upon investigation and after hearing to be in the public interest, Congress left the Commission free to ascertain the factors to be considered in each particular case and the relative weight and importance to be given to each, such factors including, on the one hand, suppression or diminution of competition and, on the other, increased efficiency, decreased cost of transportation, and the like. As bearing upon the relation of the order to transportation we call attention to the fact that the main factors deemed by the Commission to be material to the question of the public interest related to transportation, e. g. the Southwestern System of lines form a connecting link between the Rock Island and the Southern Pacific lines; they and the Southern Pacific System of lines west of El Paso, while in a sense parallel, serve different communities and industrial sections, their common points being important points of interchange of traffic to and from communities served by one and not the other; as to such traffic and as to transcontinental traffic better coordination and more efficient and economical operation will follow the acquisition of control applied for, and relations to the traveling and shipping public and to public authorities will be simplified and improved; the construction of additional transportation facilities in the form of double tracks will be avoided; the control sought will result in operating economies and make possible unification of standards and practices, etc., such economies and improvements in transportation service and practices being described in detail.

Of course, in order to show that the order relates to transportation, it is not necessary to show that every part of the order relates to transportation. It suffices if a material part thereof bears such relation.

Proceedings in the lower court.

The order of the Commission in question is dated September 30, 1924, and became effective thirty days from the date thereof (R., 32). On October 23, 1924, plaintiffs' bill of complaint was filed in the United States District Court, Western District of Texas, El Paso Division (R., 1). On October 27, 1924, the bill was presented to the District Court at El Paso with an oral motion by plaintiffs that the presiding judge (Judge Colin Neblett, sitting by designation) convene a special court of three judges to hear the application for an injunction. This motion was denied for want of jurisdiction, on the ground that it appearing from a reading of the complaint that the residence of the Southern Pacific Company was in the State of Kentucky and the residence of the El Paso & Southwestern Railroad Company was in the State of Arizona, the venue of the suit was in Kentucky or Arizona (R., 32-3). No further action was taken by plaintiffs until December 16, 1924. In the meantime the United States and the Interstate Commerce Commission, through their counsel, and the two defendant carriers, through their counsel, had on November 15 and 17, 1924, filed pleas to the jurisdiction, on the ground that the venue lay, if the suit were maintainable at all, in the District Court of the United States for the District of Arizona or for the District of Kentucky, at plaintiffs' election, the reasons given in support of the pleas being those now familiar to this Court (R., 33-34). On December 16, 1924, plaintiffs again appeared before the District Court at El Paso, forty-eight days after the signing and entry of Judge Neblett's order, and asked the presiding judge (Judge Wm. H. Atwell) to call to his assistance a Circuit Judge and another District Judge to hear and rule upon defendants' pleas. For reasons set forth in a written opinion, summarized in the succeeding paragraph of this brief, Judge Atwell granted

plaintiffs' motion for a special court and assigned the cause for hearing on January 10, 1925, at New Orleans (R., 35-38).

In a written opinion (*Home Furniture Co. et al.* v. *United States et al.*, 2 F. (2d) 765) Judge Atwell referred to the expiration of forty-eight days since Judge Neblett's decision against the jurisdiction of the Court, to the suggestion of counsel for defendants that they were not asking to have their pleas to the jurisdiction passed upon at this time but that at some more convenient date there might be available three judges, when such action might be taken, and to the insistence of plaintiffs that the cause be speeded. He expressed the view that in cases like the one before him a single judge was authorized to pass upon such questions as the jurisdiction of the Court; and, if so, that he had no authority or power to review Judge Neblett's ruling, citing *Republic* v. *Deland*, 275 F. 634, and *Brown Drug Company* v. *U. S.*, 235 F. 603; but that, notwithstanding his views, "the delicacy of the present situation" caused him "to conform to the desire of counsel" (R., 35-37).

The cause was heard at New Orleans by a special court, composed of one circuit judge and two district judges, and was submitted upon defendants' pleas to the jurisdiction. The court, finding that the order of the Commission complained of related to transportation, sustained the pleas and dismissed the bill of complaint (R., 39). Appellants' four assignments of error are to the effect that the Court erred in holding that the order of the Commission related to transportation and in dismissing the bill of complaint.

II.

Argument.

The nature of this case and of the questions presented for decision are such as to make the mere statement of the case an argument in support of the decree brought here for review, an argument so clear and convincing, in our opinion, as hardly to require or admit of further elucidation or strengthening. It clearly appears from the analysis of the bill of complaint and of the report of the Commission contained in the statement of the case that the characterizing substance, the gist, of the order is the part that authorizes the transfer to the Southern Pacific's possession, management and operation of the Southwestern's transportation plant, embracing the locomotives, cars, and all instrumentalities and facilities of shipment or carriage, things included in the statutory definition of the term "transportation".[2] This is what applicants purposed to accomplish and this is what the order was intended to effect. It likewise clearly appears that the parts of the order which plaintiffs now seek to place the emphasis upon—authority to purchase stock and to issue securities—merely provide the means for accomplishing the ultimate purpose of the order. The statement of the case disclosed that the cause of action attempted to be set out in the bill of complaint is expressly based on the natural and necessary relations of the order to transportation, and that the factors considered by the Commission in reaching the conclusion that would determine whether it would grant or deny the order applied for, namely, whether the same was in the public interest, were matters relating to transportation. In other words, it is manifest from the statement of the case that the purpose of the application to which the order owes its existence was to bring

[2] Section 1, paragraph (3) of the Interstate Commerce Act, as amended.

about certain transportation conditions; that the order was made because its transportation effects were found to be in the public interest; and that this suit to set aside the order was brought because its effects on transportation are claimed by plaintiffs to damage and injure that part of their business which involves the transportation of furniture bought and sold. And all the foregoing is true, even if we disregard the statutory enlargement of the meaning of the word "transportation", and look only to the definitions found in the dictionaries.

The conclusion that seems to us so obvious from the mere statement of the case, that the Commission's order in question relates to transportation, rests upon broad grounds. It does not call for citation of authorities in its support. It has not involved a search of the dictionaries for definitions or an exigesis of the Interstate Commerce Act, or even of the provisions thereof relating to acquisition of control, or a meticulous examination of the terms of the venue clause. While we believe that we might safely rest in the position where the statement of the case has left us, yet, as the question presented is *res nova* and of general importance, we shall now proceed to consider the definitions of the word "transportation" in the Interstate Commerce Act, as well as in the dictionaries, and of the word "relate", call attention to the few relevant decisions of this Court, examine more critically the text of the venue clause, and incidentally deal with such contentions of plaintiffs as do not refute themselves. We expect to be able to show that the definitions support the case for appellees; that there is nothing in the venue clause or in its legislative history that militates against our position; and that our construction of the words—relate to transportation—does not conflict but harmonizes with the decisions of this Court on the subject.

Before presenting an argument along the lines indicated, we shall digress a moment to point out that the venue clause in question, although found in an Urgent

Deficiency Appropriations Act, must be treated as a part of the Interstate Commerce Act, and hence, must be construed and applied in harmony with the provisions and definitions of that Act as it is to-day.

A statutory provision prescribing the venue for suits to review orders of the Interstate Commerce Commission naturally belongs to the Interstate Commerce Act. The original venue clause concerning such suits was enacted as an amendment to section 16 of that Act.[3] It was superseded by the adoption of the Commerce Court Act, and was replaced, on the abolition of the Commerce Court, by the provisions in question of the Act of 1913. If authority be required for regarding the pertinent provisions of the legislation of 1913 as part of the Interstate Commerce Act, it is afforded by the case of *Proctor & Gamble* v. *United States*, 225 U. S. 282, where it was held that the whole of the Commerce Court Act was to be construed and applied as if it were a part of the Interstate Commerce Act. As a result of regarding the venue clause before us as a part of the Commerce Act the following rules and principles are to be observed in its construction and application.

First, in determining the meaning of the terms used in that clause regard must be paid to the provisions, and especially to the definitions, found in the Interstate Commerce Act. Paraphrasing what was said in *Proctor & Gamble* v. *United States*, the venue clause of the Act of 1913 was intended to be a part of the existing system for the regulation of interstate commerce, established by the original adoption in 1887 of the act to regulate commerce and expanded by the subsequent amendments of that act. It was not intended to ignore, but to provide a method of enforcing or reviewing orders of the Commission that would harmonize with and be applicable to, the definitions and provisions of the Commerce Act and the functions of the Commission.

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[3] Act of June 29, 1906, 34 Stat. 584, 592.

Second, the Commerce Act of which the venue clause must be considered a part and with reference to the definitions and provisions of which the venue clause must be construed and applied is the amended and developed Interstate Commerce Act of to-day, with its definitions and with the new and enlarged powers and functions which it has conferred upon the Commission. This is the rule of construction announced and applied in *Pennsylvania Co.* v. *United States*, 236 U. S. 351, decided in 1915, a suit to enjoin an order of the Commission requiring the Pennsylvania Company to desist from certain discriminating rates and practices found by the Commission to be in violation of Section 3 of the Interstate Commerce Act. One of the contentions of the United States, disputed by the Pennsylvania Company, was that the proviso to Section 3—

> "but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

though not repealed, must be read in the light of later amendments.

In dealing with this contention the Court said (pp. 362-3):

> "Section 3 was a part of the original act, and remains unchanged, but there are certain amendments to the Act which are to be read in connection with §3 as if they were originally incorporated within the Act. *Blair* v. *Chicago*, 201 U. S. 400, 475. The Act as amended June 29, 1906, c. 3591, 34 Stat. 584, defines what is meant by common carriers—engaged in transportation by railroad—which are brought within the control of the Act, and a railroad is defined to include all switches, spurs, tracks and terminal facilities of every kind, used or necessary in the transportation of persons or property designated in the Act, and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said prop-

erty. Not only does the Act define railroads, but it specifically defines what is meant by transportation, which is made to include 'cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.' It is made the duty of every carrier 'subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto'; and on June 18, 1910, c. 309, 36 Stat. 539, 545, it was additionally provided that the carrier should 'provide reasonable facilities for operating such through routes and make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.' See *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286, and as to the character of such commerce, *Illinois Central R. R.* v. *Railroad Commission of Louisiana*, decided February 1, 1915, *ante*, p. 157.

It follows that the provisions of §3 of the Act must be read in connection with the amendments and subsequent provisions, which show that transportation as used in the Act covers the entire carriage and services in connection with the receipt and delivery of property transported."

The ruling in *Blair* v. *Chicago*, 201 U. S. 400, on the page (475) cited, was that

> "a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended."

The same conclusion will be reached, independently of the authorities cited, from a consideration of the fact (which

is evidenced by the provisions of the Transportation Act, 1920, and which is, moreover, a matter of public notoriety and history) that before passing the Transportation Act Congress made a most thorough, intelligent and comprehensive examination of the federal statute law relating to the powers, duties, orders, etc. of the Interstate Commerce Commission, including, it must be presumed, the venue clause now in question. It is a necessary inference from the failure to amend that Congress adopted the venue clause and intended it to be treated as a part of the amended and enlarged commerce act. It must, therefore, be construed and applied as if it had formed part of and was adopted at the same time as the Transportation Act.

It follows that, in acertaining the meaning of the word "transportation" for the purpose of determining when an order of the Commission relates to transportation, we do not treat the provisions of the Act of 1913, abolishing the Commerce Court and providing for cases formerly within the jurisdiction of that Court and for the venue thereof, as independent legislation having no connection with the Interstate Commerce Act. We are not bound even by the meaning of the word in the minds of the members of the Committees which framed the statute or in the mind of Congress which enacted it, if in the meantime by reason of subsequent changes in the Interstate Commerce Act the word has come to have a broader meaning, or if a broader or more sensible meaning may reasonably be imputed to the better informed Congress of 1920. We certainly cannot follow plaintiffs' counsel in seeking to confine its scope and meaning to what they believe to have been in the mind of one of the members of one of the Houses of Congress in 1913, even though that member had a direct part in formulating the clause in question. On the contrary we must construe the term so that it may fit in and be applicable to the provisions of the Interstate Commerce Act in its present form and so that it may conform and be in harmony with the defi-

nitions of that Act. Nothing that we have said above, however, is to be construed as an admission that there is any good reason for believing that either committee in charge of the bill or Congress or any member thereof in voting the bill into a law intended to ignore the definition of "transportation" then in the Interstate Commerce Act or to use the word in a sense so narrow, if that were possible, as to make the Commission's order here complained of bear no relation to transportation.

Returning now from our digression to a consideration of definitions, we find in paragraph (3) of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, the following enlargement or extension of the meaning of the term "transportation":

> "The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

A legislative declaration (substantially identical with that just quoted) as to the things to be included in the word "transportation" has been in the Interstate Commerce Act since the Act of June 29, 1906 (34 Stat. 584), where it originated. The dictionaries show that the word "transportation", besides meaning the act of transporting, conveyance, the carriage of persons or commodities from one place to another, is employed, especially in this country, to mean the vehicles or means of carriage, and, again, the charges therefore. For instance, one of the definitions of transportation given in the Standard Dictionary is—"(U. S.) Vehicles used in transporting; means of conveyance; also, charge for conveyance." See also The Standard Dictionary & Cyclopedia, *verbum* transportation. The words "relate to" are too familiar

to require resort to a dictionary. We give, however, one of the definitions of "relate" found in Webster's New International Dictionary—"To stand in some relation; to have bearing or concern; to pertain; refer." We submit without further argument that the definitions lead to the conclusion that would follow from a mere reading of the report of the Commission and of the bill of complaint, namely, that the order complained of relates to transportation. They show that appellees now, and the Commission when it passed upon the application, and plaintiffs' counsel when drafting the complaint, all were right in regarding the order of the Commission as having relation to transportation—to transportation services, to the cost thereof and the charges therefor. An exclusive relation to transportation is, of course, not required.

Adverting now to plaintiffs' contentions it may be predicated of them as a whole that they are discredited by the conclusion which it is claimed they lead to. Plaintiffs argue from them that the word "transportation" in the venue clause means only actual carriage, only the actual movement of freight or passengers after they have reached the vehicles of carriage. They exclude from the term all instrumentalities and facilities of transportation and all services in connection with the receipt, delivery and handling of property transported, except those directly concerned in the actual movement of shipments. Logically they should exclude transportation charges, and regulations and practices in regard thereto. That this is a too narrow definition of "transportation" is manifest. It discards all but one of the dictionary definitions. It disregards the legislative declaration as to the broad sense in which the word must be regarded as employed in the Interstate Commerce Act. When we consider the definition of "railroad" found in the same paragraph of Section 1, which is declared to include the immovables of the transportation plant, it is evident that by the term "transportation" Congress intended to embrace all the movables and all the operations of the

plant in the manufacture, sale and delivery of the intended product, which is transportation. It is idle to say that an order of the Commission which has for its main purpose and effect to transfer the possession of the transportation plant of the Southwestern System to the Southern Pacific to be operated by the latter, which was made on the ground that cheaper and better transportation would be manufactured through joint operation of the two plants, and which plaintiffs, formerly purchasers of transportation from the two plants, complain of because it will leave them with only one seller of transportation to deal with instead of two and will result in an inferior product sold at increased prices, it is idle, we submit, to contend that such an order has no relation to or bearing upon transportation. The contentions of plaintiffs as to the narrow scope and meaning to be given the term "transportation" find no support in the decisions of this Court. In *Illinois Central Railroad Company* v. *Public Utilities Commission*, 245 U. S. 493, 504-5, it was held in effect that an order of the Interstate Commerce Commission based on the finding of such disparity between schedules of interstate rates and of intrastate rates as to constitute an undue and unjust discrimination against interstate commerce, and ordering the carriers to cease and desist from such discrimination, was an order relating to transportation and, having been rendered upon petition, was required by the Statute of 1913 to be brought at the residence of the petitioner. In other words, an order to relieve interstate commerce generally in a certain region from the undue and unreasonable prejudice and disadvantage of the maintenance of a lower scale of rates upon intrastate commerce belongs to the class of orders that "relate to transportation" within the meaning of the venue clause of the Act of 1913, although no actual carriage or movement of freight is involved. *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, was a suit brought by a shipper to set aside an order of the Interstate Commerce Commission rescinding a fourth

section order, the effect of the rescinding order being the filing of tariffs increasing certain through rates which had been reduced under the original order. The defendants were the United States, the Interstate Commerce Commission, and the railroad companies (sixteen in number) upon whose application the fourth section exemption order had been originally rendered. The suit was brought in the District Court of the United States for the District of Oregon, the residence of one of the railroad companies petitioning for the original order. In disposing of an exception to the jurisdiction (p. 562) the Court held that the suit had been brought at the proper venue. In other words, the ruling of the Court was that such matters as the enforcement of the long and short haul clause of Section 4, the granting of relief therefrom, the resulting relationship between rates, questions of discrimination involved therein, are all matters that "relate to transportation" within the meaning of the venue clause of the Act of 1913, although no transportation within the narrow meaning of the word contended for by complainants was involved.

One of plaintiffs' contentions is that the United States and the Interstate Commerce Commission have no right to object to the venue, that the defendant railroad companies are not necessary parties, and that, being unnecessary parties, their objection to the venue may be disregarded. This contention evidences a complete misconception of the nature and purpose of the venue clause as well as ignorance of the rulings of this Court on the subject. The United States can be sued only with its consent and may prescribe the terms of its consent, including the venue of permitted suits. It, of course, has the right to insist that the terms of its consent be observed, and that they be strictly construed as well as strictly followed. And it was so held in *Illinois Central Railroad Company* v. *Public Utilities Commission, supra,* at page 504 of the opinion, and in *Peoria & Pekin Union Rwy. Co.* v. *United States,* 263 U. S. 528, 536. In the last

cited case a defendant railroad company had waived the right to be sued at its residence, but it was ruled, nevertheless, that the United States could insist upon the venue prescribed by the statute.

Before considering the contentions of plaintiffs based on what they call the history of the legislation in question we shall refer again to the text of the venue clause, not for the purpose of adding anything material to the brief analysis thereof made in the statement of the case (*supra*, p. 2), but rather for the purpose of explaining why, in this case, further discussion of the text may be dispensed with. The scheme of the venue clause, so far as its framers can be said to have had an intelligent and consistent scheme (for it was the hasty work of Committees on Appropriations in an unfamiliar field of legislation), was to provide a general rule to cover the majority of cases and to provide for exceptional cases in the two clauses beginning with the word "except".[4] It seems to have been correctly assumed that the vast majority of the Commission's orders would relate to transportation and be made upon petition, and the general rule, intended to cover such cases, followed the still more general rule that a man ought to be sued at his own domicil, this on the theory that the real party in interest in a case attacking an order made upon petition was the party upon whose petition the order was made. When, however, an order of the Commission is made upon petition but does not relate to transportation, the general

[4] "The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term 'destination' shall be construed as meaning final destination of such shipment."

rule by its terms does not apply, and the venue was fixed in the district where the matter complained of in the petition before the Commission arises. So far we meet with no trouble, except the difficulty, to which we shall presently revert, of determining in what district a matter so complained of arises. We now meet with an insuperable difficulty arising from the use of inept language and confusion or absence of thought, for in dealing with an order relating to transportation but not made upon petition, the venue prescribed is still "in the district where the matter complained of in the petition before the Commission arises"—and there is no such petition! There is also ineptitude of language and confusion of thought in the second "except" clause, which applies to orders that do not relate to transportation or to "a matter so complained of before the Commission", in which cases "the matter covered by the order" shall be deemed to arise in the district where one of the petitioners in court has either "its" principal office or principal operating office. As the order complained of in this case was unquestionably made upon petition, we are not concerned with the above indicated inaccuracies and ambiguities of the venue clause. In the confident belief, moreover, that the argument urged in support of appellees' side of the case will not thereby be affected or otherwise prejudiced, we shall not burden the Court with a discussion of orders that lie in the doubtful zone between transportation and non-transportation orders or with attempts to explain why the framers of the venue clause made the distinction they did between orders made upon petition that relate to transportation and orders made upon petitions that do not relate to transportation. To show that our interpretation of the term transportation has not emptied the "except" clauses of their substance we give the following instances of orders which in our opinion do not relate to transportation, viz: accounting orders, such as orders prescribing depreciation charges; valua-

tion orders; orders dealing solely with issuance of securities, such as permitting the issue of refunding mortgage bonds or the capitalization of expenditures out of current income for capital purposes.

We referred above to the difficulty in some cases of determining in what district the matter covered by the Commission's order or by the petition before the Commission arises. Suppose plaintiffs should succeed in establishing their contention that the order they complain of does not relate to transportation, their success would be due to having convinced this Court that the controlling feature of the order, for purposes of venue, is the part that authorizes the issuance of securities or the part that authorizes the purchase of securities. Plaintiffs would still have to show that their suit was brought at the prescribed venue, where, and not elsewhere, the United States has consented to be sued. This means that plaintiffs must satisfy the Court that the matter of the issue of securities by the Southern Pacific Company, a Kentucky corporation, or the matter of the purchase by the Kentucky corporation of securities from the El Paso & Southwestern Company, a New Jersey corporation, under a contract made in New York, is a matter that arises in the Western District of Texas.

We have not yet dealt with the last sentence of the venue clause—

> "In case such transportation relates to a through shipment the term 'destination' shall be construed as meaning final destination of such shipment."—

which it is claimed by plaintiffs shows that the term "transportation" was used only in the narrow sense of the actual carriage of shipments after being loaded into cars and the cars made up into trains. It will be observed that the term "destination" does not appear elsewhere in the venue clause. The quoted sentence is therefore meaningless. It evidently does not belong in the venue clause as finally adopted. It was inadvertently left in

by the Conference Committee.[5] This will sufficiently appear from the following excerpt from H. R. 7898, 63d Congress, 1st Session, in the House of Representatives, October 7, 1913, in which will be found the Senate amendments numbered, the parts of the House Bill eliminated by the amendments erased, and the amendments italicised:

> "The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district (62) ~~where some or all of the transportation covered by the order has either its origin or destination~~ *wherein is the residence of the party or any of the parties upon whose petition the order was made*, except that where the order does not relate to transportation (63) *or is not made upon the petition of any party* the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term 'destination' shall be construed as meaning final destination of such shipment."

The sentence in question may be likened to the vestigial organs which anthropologists tell us are found here and there in the human anatomy, such as the relic muscles which in man's prehuman stage used to move the ears or to raise the hair; and it should now be regarded as a functionless vestige or trace showing merely the evolutionary path of the venue provision.

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[5] After offering the Senate amendments Senator Walsh said it will now be necessary to strike out the last sentence of the venue clause in the House Bill, which statement was accepted by Senator Overman, Chairman of the Senate Committee on Appropriations.
Cong. Rec., Vol. 50, Part 6, page 5425, 63d Cong. 1st Sess.

We have now come to an appropriate place at which to consider the contentions of plaintiffs based on what they call the legislative history of the venue clause. If by legislative history were meant prior legislation on the subject, the Interstate Commerce Act, as amended, and statutes prescribing the venue for suits of this character, there would of course be no objection to a resort by the Court to such sources for any needed light they may throw upon the questions raised by this appeal. We ourselves are insisting that the venue clause must be construed and applied as a part of the Interstate Commerce Act with all its amendments up to date. But what plaintiffs mean by legislative history is the evolutionary history of the Act of 1913, what occurred during the passage of the law through the 63d Congress, especially, if not exclusively, the form of the venue clause as it was when the bill first passed the House, and which was afterwards rejected, and the debates in Congress, or rather an explanation by one member of the Senate who was not in charge of the bill in course of passage (*infra*, pp. 33, 34).

We question the necessity and the propriety of a resort to such extraneous aid. This case calls simply for the ascertainment of the scope and meaning of the words "relate to transportation", having regard not only to the popular signficance of the word "transportation" as evidenced by the dictionary definitions but having special regard to the legislative extension of its meaning placed in the Interstate Commerce Act as long ago as 1906. "If there be ambiguity in them it is the office of construction to resolve it." *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591, 602. See also *Caminetti* v. *United States*, 242 U. S. 470, 490. The objection to subjecting judicial construction to the evolutionary history of the Act is greatly strengthened by the circumstance, pointed out above (pp. 20-24), that the venue clause is to be regarded as a part of the Interstate Commerce Act in its present form and is to be construed and applied

as if it had been introduced and adopted at the same time as the Transportation Act and by the same Congress. Hence its interpretation is not to be controlled or limited, or even influenced, by the views or the limitations upon the horizon of the members of the Congress that enacted it.

If, however, this Court deems it proper to look to what occurred in the course of the passage of the law for light upon the legislative intent, its search will be fruitless. The sources of light to which under well settled principles the Court will confine itself are reports of committees, explanatory statements in the nature of a supplemental report made by a committee member in charge of a bill in course of passage, and changes made in the form of the bill in the course of its passage. *Duplex Co.* v. *Deering*, 254 U. S. 443, 474-5; *United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310, 318. It is settled by repeated decisions that "the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body." *Duplex Co.* v. *Deering, supra.* Now the excerpt given above (p. 31) from the H. R. 7898 shows that the provision of the venue clause now involved was a result of Senate Amendment. The amendment was made on the floor of the Senate and accepted without debate.[6] The report of the Conference Committee contains nothing but the bare statement that the House receded from its disagreement with the Senate amendment, referred to by number.[7] We have found no report of any Senate or House Committee containing any discussion of the venue clause. There are no explanatory statements in the nature of a supplemental report made by a committee member in charge of the bill in course of passage. There remains only the form

[6] Cong. Rec., Vol. 50, Part 6, page 5425, 63d Cong., 1st Sess.
[7] H. R. Report No. 91, 63d Congress, 1st Session.

of the venue clause contained in the House Bill before it went to conference (*supra*, p. 31). A resort to a provision once appearing but subsequently rejected in course of passage cannot be justified on the theory, urged by plaintiffs, that it means the same thing as the provision subsequently substituted therefor and enacted. (*Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 199). If the meaning of the language in the House Bill and of the language of the statute be different, we know of no precedent for giving any effect to the former except, perhaps, the biblical adage respecting the promotion of the stone rejected of the builders, which has not heretofore been regarded as a canon of statutory construction. Finally, the form of the House Bill under discussion throws no worthwhile light upon the meaning of the enacted clause. Resort thereto would result in the substitution of confusion for reasonable clearness, whereas the seeking of such extraneous aid is "only admissible to solve doubt and not to create it." *Wisconsin R. R. Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 589.

In arguing as we have against an attempt to ascertain the meaning of the enacted statute by a resort to the form of the venue clause in the House Bill we are not to be understood as conceding that plaintiffs' case would be advanced by a consideration of the venue clause at one time preferred by the House. Notwithstanding such consideration the word "transportation" must be interpreted to harmonize with the definitions of the Interstate Commerce Act, and the allegations of the bill of complaint and the report of the Commission will still show that the order complained of relates to transportation.

If our contention that this Court should not be controlled or influenced by the limited horizon of the Congress which passed the venue clause needed further support, it would be afforded by the debate or colloquy in the Senate over the venue clause of the Act of 1913, re-

ported in Vol. 50, Cong. Rec., Part 6, pages 5616 ffg. 63d Congress, 1st Sess. The colloquy took place after the conference report, when it was too late to amend. It shows how little intelligent attention the venue clause had received. It also shows, and this is important only in the improbable event that the Court will resort to Senator Walsh's explanations for assistance in interpreting the statute, that these explanations were again given and were not regarded as satisfactory by the Senators whose inquiries evoked them.

It seems to be conceded that the suit was not instituted at the residence of either the Southern Pacific Company or of the El Paso & Southwestern Railroad Company. The lower court so ruled, and its ruling has not been made the subject of any assignment of error. The correctness of the ruling is well settled by the decisions of this Court. *In re Keasbey and Madison Company*, 160 U. S. 221, 229; *Southern Pacific Company* v. *Denton*, 146 U. S. 202, 205; *Seaboard Rice Milling Co.* v. *Chicago, R. I. & P.* October Term, 1925, Decided March 1, 1926.

If the views of the plaintiffs as to the absence of any relation of the order complained of should prevail, it will still be necessary for them to show that the matter of the Commission's order or of the petition upon which it was made is a matter that arises in the Western District of Texas (*supra*, p. 30).

We submit that plaintiffs are depending upon the relations of the order to transportation to show an interest sufficient to entitle them to sue and upon the absence of any such relations to show that the suit was brought at the prescribed venue.

We ask that the decree appealed from be affirmed.

Respectfully submitted,

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Solicitors for Appellees.

JOSEPH PAXTON BLAIR,
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(15)

SUPREME COURT OF THE UNITED STATES.

No. 324.—October Term, 1925.

Home Furniture Company, George H. Park, and James F. Kilcrease, etc., appellants,
vs.
The United States of America, the Interstate Commerce Commission, the Southern Pacific Company, et al.

Appeal from the District Court of the United States for the Western District of Texas.

[June 1, 1926.]

Mr. Justice McReynolds delivered the opinion of the Court.

Appellants are residents of El Paso, Texas, and there engage in the business of buying and selling furniture. By a bill presented to the United States District Court for the Western District of Texas, they sought annulment of an Interstate Commerce Commission order, which permitted acquisition of control over the Southwestern System by the Southern Pacific Company.

They alleged—

That the Southern Pacific Company is a corporation under the laws of Kentucky, which operates railroads in California, Arizona, New Mexico and other States.

"That defendant El Paso & Southwestern Railroad Company is a corporation incorporated under the laws of the State of Arizona and is authorized to and does operate railroads in the State of Arizona, New Mexico and Texas; that said defendant is engaged in the transportation of passengers and property in interstate commerce subject to the Interstate Commerce Act; that defendant is part of what is known as the El Paso & Southwestern Railway System, consisting of the following railroad companies, viz: The El Paso & Southwestern Railroad Company, the El Paso & Southwestern Railroad of Texas, the Burro Mountain Railroad Company, the Arizona & New Mexico Railway Company, the Dawson Railway Company, the El Paso & Northeastern Railway Company, the El Paso & Rock Island Railway Company, the Alamo-

gordo & Sacramento Mountain Railway Company, the El Paso & Northeastern Railroad Company, and the Tucson, Phoenix & Tide Water Railway Company, hereinafter, for convenience sake, referred to as the Southwestern System; that all of the issued and outstanding capital stock and a portion of the outstanding bonds of the companies comprising said System are owned directly or indirectly by the El Paso & Southwestern Company, a holding corporation of the State of New Jersey; that of the railway companies comprising said system only the defendant El Paso & Southwestern Railroad Company is engaged in the transportation of passengers and property in interstate commerce, which said company, in addition to operating the lines of railway owned by it, operates under lease all of the existing railways of the remaining companies comprising said system."

That the Southern Pacific Company and the El Paso & Southwestern Railroad Company, on July 1, 1924, petitioned the Interstate Commerce Commission for an order approving the former's proposal to acquire control of the Southwestern System by stock ownership and through leases.

That, on September 30, 1924, the Commission approved the proposal.

That they will be injured, by the proposed control, through loss of opportunity to route their goods over either of two competing systems, and the depreciation of service and increase of rates which will naturally result from suppression of competition. The gravamen is that transportation facilities, service and charges will be adversely affected by the union of the two systems under one management.

Appellees denied jurisdiction of the court and asked dismissal of the bill. They set up, by plea—

> That the venue of the suit upon said alleged cause of action does not lie in the District Court of the United States for the Western District of Texas, but, on the contrary, said venue lies, if the suit is maintainable at all, in the District Court of the United States for the District of Arizona or for the District of Kentucky, as complainants may elect to file their bill in either of said districts, for the following reasons, to wit: Because it affirmatively appears from the fact of complainants' bill heretofore filed herein that Southern Pacific Company, a corporation of the State of Kentucky,

having its domicile in said State of Kentucky, and El Paso & Southwestern Railroad Company, a corporation of the State of Arizona, having its domicile in said State of Arizona, were the parties upon whose petition the order of the Interstate Commerce Commission sought to be reviewed and set aside in this proceeding was made and because it further appears from the said bill of complainants that the said order relates to transportation and was made upon the petition of the parties aforesaid.

This plea was sustained January 15, 1925, 2 Fed. (2d) 765, and the cause is here by direct appeal. Act October 22, 1913, c. 32, 38 Stat. 208, 220. Decision of the question at issue must turn upon the proper construction and application of the following provision of that Act, pp. 219, 220—

> The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

The language of this provision was not happily chosen, but when consideration is given to the situation of the complaining parties here, the gravamen of their bill and the report of the Commission, we think it becomes sufficiently clear that its order has direct relation to transportation, within the meaning of the statute.

The Commission found:

> The lines of the Southwestern System are intermediate between the lines of the Southern Pacific, and the lines of the Chicago, Rock Island & Pacific Railway System, hereinafter

called the Rock Island. The lines of the three systems constitute one of the principal direct routes between southern California and the Missouri River and Chicago, and are included in the Southern Pacific-Rock Island System in the grouping of railroads under the tentative plan for consolidation of railroad properties promulgated by us under date of August 3, 1921. Consolidation of Railroad Properties, 63 I. C. C. 455. Acquisition of control of the Southwestern System by the Southern Pacific is in harmony with this plan. It will result in direct physical connection between the lines of the Southern Pacific and the Rock Island, will assure the continuance of this route, and will increase its competitive strength as compared with the routes of the Santa Fe and Union Pacific. While the lines of the Southern Pacific and Southwestern System west of El Paso may be said to be parallel they serve different communities and industrial sections. The points at which the two systems meet are important points of interchange of a large traffic to and from communities served by one but not the other. Better coordination and more efficient and economical operation will follow as to this traffic and as to transcontinental traffic in connection with the Rock Island, and relations to the traveling and shipping public and to public authorities will be simplified and improved.

The challenged order was made upon a petition, and neither party thereto resides within the Western District of Texas. It related to transportation. Consequently, the court below was without jurisdiction. See *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 563. Moreover, the bill alleged no probable direct legal injury to appellants except such as might arise out of changed conditions in respect of transportation to and from the City of El Paso. Accordingly, they had no proper cause of complaint unless the order had definite relation to transportation. *Hines, etc.* v. *United States*, 263 U. S. 143, 148.

The decree of the court below must be

Affirmed.